IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6165 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE D.H.WAGHELA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SAMASTA GUJARAT RAJYA MOCHI SAMAJ

Versus

UNION OF INDIA THRO' SECRETARY

Appearance:

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MR.MUKTESH V. PATEL, ADVOCATE for the Respondent No.9

MR.S.V.BACHANI, ADVOCATE for the Respondent No.10

MR.D.P.JOSHI, ADVOCATE for the Respondent No.11

CORAM : HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE D.H.WAGHELA

Date of decision: 05/02/2004

ORAL JUDGEMENT

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(Per : HON'BLE MR.JUSTICE R.K.ABICHANDANI for the Court)

1. The petitioner seeks to challenge the validity of the Constitution (Scheduled Castes) Orders (Second Amendment) Act, 2002, to the extent that it excludes `Mochis' outside Dangs district and Umargaon Taluka of Valsad district in the State of Gujarat from the Schedule 1 to the Constitution (Scheduled Castes) Order, 1950, on the ground that the provisions excluding them were violative of Articles 14, 16, 19 and 341 of the

Constitution of India, and a declaration is sought that Entry 4 in Part IV relating to Gujarat of the Schedule to the Constitution (Scheduled Castes) Order, 1950, as amended by the Constitution (Scheduled Castes) Orders (Second Amendment) Act, 2002, is unconstitutional, null and void to the extent the said Entry 4 de-recognises and de-specifies `Mochis' outside of Dangs district and Umargaon Taluka of Valsad district from the notified list of Scheduled Castes.

Brief facts and pleadings :

2. The petitioner is a public trust registered under the provisions of the Bombay Public Trusts Act, 1950, said to be representing the entire Mochi community of Gujarat, as averred in paragraph 2 of the petition. According to the petitioner, in the year 1976, by enactment of the Scheduled Castes & Scheduled Tribes Orders (Amendment) Act, 1976 (hereinafter referred to as `the Amendment Act of 1976', the entire Mochi community of Gujarat was specified as Scheduled Caste by the Parliament by removing the area restriction which was causing great difficulties to the members of this community in the areas where they had not been so specified. The case of the petitioner is that this was done, because, there was no discernible or real difference between the Mochis of Dangs district and Umargaon Taluka of Valsad district on one side, and the Mochis residing elsewhere in Gujarat on the other, as both were following unclean pursuits by working with hides and skins of animals. Since both the groups were socially, economically, educationally and culturally similar, the discrimination was removed by the Parliament. According to the petitioner, as per the findings of the Baxi Commission, the entire Mochi community in the State of Gujarat was a depressed class which ought to have been specified as Scheduled Caste.

2.1 The inclusion of the entire Mochi community in the Schedule 1 to the Constitution (Scheduled Castes) Order, 1950 (hereinafter referred to as `the Order of 1950') by the Amendment Act of 1976, came to be challenged by the Gujarat Dalit Civil & Constitutional Rights Pratipadan Samiti and others, by filing Special Civil Application No.3432 of 1985 on the ground that the said Act was ultra vires Articles 14 and 341(2) of the Constitution. That petition was contested by the State Government by contending that the Baxi Commission, had come to the conclusion that the Mochi community was considered to be very low and had suffered all the disadvantages of having such social status and that the

findings of the Baxi Commission showed that Mochi community was required to be recognised by Parliament as Scheduled Caste.

2.2 The Division Bench, by its judgement and order dated 27-11-1987, in the case of Gujarat Dalit Civil & Constitutional Rights Pratipadan Samiti v. Union of India & ors., reported in 29(1) GLR 290, observing that the object and reasons for treating the Mochi community of the whole of Gujarat as Scheduled Caste was to remove the area restriction for a particular community which was otherwise treated differently in different areas in the same State and to remove the hardship that was experienced by the community in social relations between them simply because they resided in different areas of the same State, held that the wisdom of the Parliament in enacting the impugned legislation (Amendment Act of 1976), cannot be questioned since it was made after getting the report of the Commission in consonance with the provisions of Article 341 of the Constitution. Special Leave Petition filed against that decision under Article 136 of the Constitution (Special Leave Petition No. 2151 of 1998) came to be dismissed, as withdrawn. According to the petitioner, right from the date of inclusion of the entire Mochi community in the Schedule to the Order of 1950, there had not been any discernible and real change in the social and cultural status of Mochis outside of Dangs district and Umargaon Taluka of Valsad district, and that most of the Mochis in Gujarat were engaged in the work which was considered to be untouchable. The Parliament, by the impugned Amendment Act of 2002, amended the Constitution (Scheduled Castes) Order, 1950, by amending the Entry 4 of Schedule I and re-imposed area restriction for Mochi community by specifying only Mochis of Dangs district and Umargaon Taluka of Valsad district as Scheduled Caste and thus, despecifying or derecognising Mochis of other areas of Gujarat from the list of Scheduled Castes. Consequent upon the change effected by the impugned Amendment Act of 2002, the resolution dated 18-2-2003 was passed by the Government of Gujarat providing that all certificates of Scheduled Castes issued to the Mochis of such other areas were to be treated as cancelled. According to the petitioner, the impugned provisions cause discrimination amongst those who are similarly situated by imposing unwarranted area restriction and violate the provisions of Articles 14, 15, 16, 19(1)(d) & (e) of the Constitution.

2.3 It was also contended that no exercise of appointing a Commission and considering its

recommendation, as was undertaken prior to the Amendment Act of 1976, was undertaken by the Parliament before imposing the area restriction by the impugned Amendment Act of 2002. No Commission was appointed to re-examine the list of Scheduled Castes and without there being any finding of either the National Commission for the Scheduled Castes & Scheduled Tribes or any other Commission that the Mochis of Dangs district and Umargaon Taluka of Valsad district were more depressed than the Mochis elsewhere in Gujarat and without following the procedure laid down in Article 341 of the Constitution, the Parliament had sought to restore the position prevailing in 1950 in respect of Mochis in the State of Gujarat, which amounts to colourable exercise of the legislative power by the Parliament in contravention of Article 341(2) of the Constitution.

3. The Union of India contested the petition by filing an affidavit-in-reply of the Director, Ministry of Social Justice and Empowerment, Government of India, contending that the petition was not maintainable in view of the ratio laid down in a catena of decisions of the Apex Court to the effect that the Scheduled Castes Order has to be applied as it stands and no inquiry can be held or evidence let in to determine whether or not some particular community falls within it or outside it, and that, no action to modify the plain effect of the Scheduled Castes Order, except as contemplated by Article 341 was valid. Clause (2) of Article 341 does not permit anyone to seek modification of the said Order by leading evidence that the caste / tribe (A) alone is mentioned in the Order but caste / tribe (B) is also a part of caste / tribe (A) and as such, caste / tribe (B) should be deemed to be a Scheduled Caste. It is only the Parliament that is competent to amend the Orders issued under Articles 341(1). It was contended that the Amendment Act of 1976 generally sought to remove the area restrictions, as was evident from the fact that area restrictions of approximately 704 communities in several States, including Gujarat, were sought to be removed save and except such communities where the Joint Select Committee did not recommend removal of area restriction. It is stated that, after the year 1976, consistent efforts were made for comprehensively modifying the list of Scheduled Castes and Scheduled Tribes pursuant to the proposals received from various State Governments from time to time, and the matter was considered by a Group of Ministers during the period from 1986 to 1988. After the Amendment Act of 1976, the respondent No.1 Union of India had received various representations from the State of Gujarat to the effect that the Mochi community in the

State, except Dangs district and Umargaon Taluka of Valsad district was never suffering from disability of untouchability, and that, this community was far advanced as compared to the other Scheduled Castes community in the State. In the year 1993, an Advisory Committee was also set up for considering comprehensive modifications in the list of Scheduled Castes and Scheduled Tribes pursuant to the proposals received by the Government for modification of the list of Scheduled Castes in various States as well as Union Territories. The Government of India, in June 1999, had approved and finalized the modalities for deciding inclusion, exclusion and / or other modifications in the list of Scheduled Castes and Scheduled Tribes which involved adherence to the following steps :

(A) The proposal is first recommended by the concerned State Government / Union Territory Administration.

(B) The proposal is then recommended by the Registrar General of India (RGI) (Census Commissioner).

(C) the proposal is then further required to be recommended by the National Commission for Scheduled Castes & Scheduled Tribes (NCSCST).

(D) After the proposal is recommended by the above three agencies, it is sent for inter-ministerial consultation and then placed before the cabinet.

(E) After the Government approves it, the proposal is put up in the form of a Bill in the Parliament for consideration and passing.

(The modalities as revised on 25-6-2002 are at Anenxure "I" to this affidavit-in-reply.).

The Constitution (Scheduled Castes) Orders (Amendment) Bill, 2002 before being passed by the Parliament was referred by the Honourable Speaker, Lok Sabha to the Standing Committee on Labour and Welfare for examination and report on 31-8-2001, and the Standing Committee of the Parliament after deliberating on the said issue subsequently gave its report and agreed to the proposals as contained in the Bill in its entirety. The Bill was passed and it received Presidential assent on 17-12-2002. According to the Government of India, on account of changed circumstances after 1976 and additional material including the subsequent proposals as received from the State Governments, the Parliament is not inhibited from

exercising the power as envisaged under Article 341(2) of the Constitution, and that the modification done by the Amendment Act of 2002 was justified in view of the proposals received by the respondent No.1 from the State of Gujarat (as per Annexure II collectively. to the affidavit-in-reply), for conferring the Scheduled caste status on the Mochi community of Dangs district and Umargaon Taluka of Valsad district. Therefore, the question of the Amendment Act of 2002 being in contravention of the earlier decision of the High Court rendered in the context of the Amendment Act of 1976 did not arise. It is contended that, in a given set of circumstances, the Parliament would be justified in recognizing the Scheduled Caste status for a particular community or a group within a particular community within a particular State, and that the concept of area restriction for particular Scheduled Castes of particular States has been recognized and has been in existence ever since past 53 years since the promulgation of the Constitution (Scheduled Castes) Order, 1950 and is not a new concept introduced by the Amendment Act of 2002. From the Statement of Objects and Reasons to the Constitution Scheduled Castes Orders (Amendment) Bill 2001, it is pointed out that the request of the State Governments for removing anomalies in the list were considered and the requests were processed as per the modalities approved by the Cabinet Committee on the Scheduled Castes, the Scheduled Tribes and Minorities on 15th June 1999, and after consultation with the State Governments / Union Territory Administrations, the Registrar General of India and the National Commission for the Scheduled Castes and the Scheduled Tribes, the list of Scheduled Castes was proposed to be amended for 18 States and Union Territory Administrations in respect of 81 communities. It is stated that, thus, the Amendment Act of 2002 was enacted after an elaborate inquiry and recommendation of the State Government and after due adherence to the modalities culminating in the final assent of the President and the same cannot, therefore, be questioned before the High Court in view of the well settled law. It is contended in paragraph 6(C) that it is only after a detailed examination of the relevant aspects, such as, social, economic, educational backwardness as well as the traditional practice of untouchability as prevailing in the various regions at various levels that the said area restriction was re-imposed by the Parliament and brought into force with the assent of the President. It is admitted that both the groups of Mochis were equally backward, but contended that the fine line of distinction between the two groups was that though the entire Mochi community had been given

the status of backward class, the Scheduled Caste status had been conferred only on Mochis of Dangs district and Umargaon Taluka of Valsad district. As regards the Baxi Commission Report, it was contended that it was only an exercise undertaken by the State Government prior to the Amendment Act of 1976. The State Government, had subsequent to that Amendment, made numerous proposals to the respondent No.1 for modification of the entry by re-introducing the area restriction as it prevailed prior to the Amendment Act of 1976. It is contended that the Parliament was empowered to modify the list of Scheduled Castes despite the Baxi Commission report if on account of the subsequent changed circumstances, the modification was necessitated and that the Mochi community was not entitled to seek the status as Scheduled Castes perpetually.

3.1 The modalities for deciding inclusion and exclusion in the list of Scheduled Castes and Scheduled Tribes are annexed at Annexure I to the affidavit-in-reply, as per which it is required that the proposals are to be processed by referring the cases favoured by both the State Governments and Registrar General of India, in their most recent reports, to the National Commission for Scheduled Castes and Scheduled Tribes for their opinion and the Commission, while examining these cases is required to associate through panels or other means, expert individuals, organizations and institutions in the fields of anthropology, ethnography and other social sciences, in addition to the State Governments, R.G.I. and the Anthropological Survey of India, on a regional basis. They may also consider holding public hearings in areas relevant to the claims under examination. It was made clear that these guidelines may not be binding on the Commission, but may be suggested in the interest of fuller examination of the cases. The claims for inclusion or exclusion or other modifications that neither the R.G.I. nor the concerned State Governments have supported were not to be referred to the National Commission and were required to be rejected at the level of the Ministers for Social Justice and Empowerment.

4. The State of Gujarat and the Director of Social Welfare Department, Government of Gujarat (respondents Nos. 2 and 3) have, in their affidavit-in-reply, contended that Mochi community is found in almost all districts in Gujarat, and the people "who are engaged in the trade or manufacturing of footwear" are called Mochi. Their occupation is to make shoes by hands from hides. The manufacturing of shoes is done by using processed

hides and by purchasing raw hides and after processing them. It is pointed out that the Government of erstwhile Bombay State constituted a Committee on 5th November 1928, under the Chairmanship of Shri O.H.B.Starte and other members, including Dr.B.R.Ambedkar, for the purpose of inquiring into the educational, economic and social conditions of the depressed classes, "untouchables" and of the aboriginal tribes, in the Presidency and recommend measures for their upliftment. On the basis of the report of that Committee, the Mochi community residing in the Gujarat area of Bombay Presidency was not specified as Scheduled Caste in the list prepared by the Government of India in 1935 and attached to the Orders-in-Council issued under the Government of India Act, 1935, which was referred to as the Government of India (Scheduled Castes) Order, 1936. In that report, at entry No.31, it was mentioned that "Mochis" were being treated as untouchables except in the State of Gujarat. Further, "Mochi" caste was included at entry No.59 in the list of Other Backward Class in Schedule No.3 by stating that it was "touchable" in Gujarat and "untouchable" elsewhere. It is also pointed out that the Committee constituted by the erstwhile Bombay Government to survey the industry of skinning and tanning the hides in Bombay State by resolution dated 28-5-1959, in its report stated that, in Gujarat region, the Mochis are engaged in leather products and that they are not "untouchables" in Gujarat. In the year 1960, on bifurcation of bilingual State of Maharashtra and Gujarat, the Umargaon Taluka and Dangs district became parts of State of Gujarat and since these were amongst the 14 districts in the entire State of Bombay wherein Mochi community was specified as Scheduled Caste, as per the Order of 1950, the Mochi community residing in these two areas continued in the list of Scheduled Castes in Gujarat. The erstwhile Saurashtra Backward Class Board, Bombay State, Rajkot, after conducting a comprehensive research study of the Backward communities of Saurashtra, mentioned in their report, that :

> "Audichya Brahmins were the gor or priest of the Mochis who were invited by them to solemnise marriages. The Brahmins seek and receive gifts etc. from them in places like Kundala, Gadhada, Kutiyana etc."

In 1976, the Government of Gujarat had constituted a Socially and Educationally Backward Class Commission under the Chairmanship of Hon'ble Mr. Justice A.R.Bakshi to make necessary recommendations after examining the

socially and educationally backward class of people of Gujarat other than those belonging to the Scheduled Castes and Scheduled Tribes. The Baxi Commission, in its report submitted on 27-2-1976, stated that the social status of Mochi community appeared to be a little higher than that of Harijans.

4.1 It is contended that the Notification of the Amendment Act of 1976 came as a set back to the people of Scheduled Castes in entire State of Gujarat and many representations from the members of the Scheduled Castes of Gujarat were received by the Government regarding re-imposition of the area restriction in Gujarat which was prevailing before 1976 so that the benefits that were provided to the Scheduled Castes were not siphoned off by those relatively better of sections of the society who were not suffering from the practice of untouchability. After considering these representations, the Government of Gujarat proposed to the Government of India to reimpose the area restrictions under the communication dated 11th May 1977 alongwith the Report of the Director, on such representations, as per Annexure R-I collectively to the said affidavit-in-reply. The State Government strongly recommended to the Government of India to impose area restrictions, as per communications produced at Anenxure R-II collectively to the said affidavit-in-reply. It is also pointed out that the National Commission for Scheduled Castes and Scheduled Tribes made recommendations in the year 1980-81 in which it was stated that, according to the information made available to the Commission, the Government of Gujarat had proposed to the Government of India, in October 1977, the restoration of position of the "Mochi" community in the list of Scheduled Castes of Gujarat State, which obtained prior to enforcement of the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976, that is, the "Mochi" community be recognized as a Scheduled Caste only in the Dangs district and Umargaon Taluka of Valsad district and not in the entire State. The Commission reiterated this in its reports in the years 1986-87 and 1993-94. It is contended that the Constitution (Scheduled Castes) Order (Second Amendment) Act, 2002 does not violate any constitutional provisions, and that, under Article 366(24), a deeming fiction is created and once the Parliament had decided to exclude in the notification any caste as scheduled caste, the same cannot be questioned in the Court of law. it is the President who has been authorized to limit and specify, castes, races or tribes and may well come to the conclusion that not the whole caste, race or tribe, but parts or groups within them should be specified as

scheduled caste. It is urged that thus, the wisdom of Parliament in making the Amendment Act cannot be subjected to any further interpretation, as extensive exercise had been undertaken by the Parliament and after considering several reports, the impugned Act was passed. It is also contended that, having regard to the recommendations by various Commissions, the "Mochi" community was brought under the category of socially and educationally backward class by resolution dated 27-5-2003 and therefore, the "Mochi" community residing in the rest of the State can avail of benefits intended for such class.

5. In the sur-rejoinder filed on behalf of the respondents Nos. 2 and 3, it has been contended that the Baxi Commission Report neither contains any recommendation to consider the "Mochi" community as a Scheduled Caste, nor does it recommend revocation of area restrictions in respect of Mochi community. In paragraph 3.2 of the said sur-rejoinder, the terms of reference of the Baxi Commission are re-produced for pointing out that it was required to report what section / sections of the castes, races, tribes etc. (other than the Scheduled Castes and Scheduled Tribes) should be treated as socially, educationally and in any other way backward and therefore, deserve the special treatment and grant of special concessions similar to those being granted to the Scheduled Castes and Scheduled Tribes in the State. It is contended that the Mochi community was not considered to be a Scheduled Caste in the State right from 1936 to 1976 and the anomaly arose when the Government of India removed the area restriction vide the Amendment Act of 1976 and as a result, the "Mochi" community was classified as a Scheduled Caste in the entire State. Such anomaly has been rectified through re-imposition of area restriction by the impugned Amendment Act of 2002. It is contended that the Baxi Commission was neither assigned the task of classifying the castes as Scheduled Caste nor to make any recommendations in that regard.

5.1 In the sur-rejoinder filed on behalf of the respondent No.1 - Union of India, it has been stated that the National Commission for Scheduled Castes and Scheduled Tribes had discussed the issue regarding re-imposition of area restriction for the Mochi community of Gujarat in the list of Scheduled Castes in their meeting held on 14-1-2000 and the Commission concurred with the State Government's proposal to re-impose the area restriction in the case of Mochi community of Gujarat in the list of Scheduled Castes as it existed before 1976 i.e. Mochi community in Gujarat may be

treated as Scheduled Caste only in Dangs district and Umargaon Taluka of Valsad district. Relying upon the decision of the Supreme Court in Pankaj Kumar Saha v. The Sub-Divisional Officer, Islampur and others, reported in 1996 (JT) 200 and State of Maharashtra v. Milind, reported in AIR 2001 SC 393, it is contended that no inquiry is at all permissible and no evidence can be let in for establishing that a particular caste or part or group within caste or tribe is included in Presidential Order if they are not expressly included in it. It is also contended that in view of this settled position of law, the petitioner is not justified in seeking the production of the records, etc. for ascertaining the steps followed by the Commission as well as the Registrar General of India, once the Parliament has considered and passed the Bill after the said proposal had obtained sanctions / concurrences at various stages. It is pointed out that, in the letters received from the Government of Gujarat on 11-5-77, in October 1981, on 14-5-1982, 22-8-1990 and 30-7-2001, repeated requests of were made for re-imposition of area restriction in case of Mochi community in Gujarat. The proposal of the Gujarat Government was sent to the Registrar General of India and the National commission for Scheduled Castes and Scheduled Tribes for their comments as per the approved modalities, and both the organizations agreed with the recommendations of the Government of Gujarat for the imposition of the area restriction in the case of Mochi community. It is pointed out in paragraph 6 of the said sur-rejoinder that the Amendment Bill, 2001 explicitly provided that a number of requests were received from the Government for removing certain anomalies in the list. It is contended that there is a statutory presumption of due compliance with the procedure and the approved modalities and therefore, no contention can be raised by the petitioner that there was no material for including the area restriction in respect of Mochi community. It is denied that the modalities approved were not in conformity with Articles 338 and 341 of the Constitution. It is reiterated that both the groups of Mochis are backward, however, the backwardness amongst the Mochis of Dangs district and Umargaon Taluka of Valsad district was associated with the age-old practice of untouchability and therefore, untouchability was considered as a factor for inclusion in the list of Scheduled Castes.

5.2 In the additional affidavit filed on behalf of the Union of India by the Director of Ministry of Social Justice & Empowerment, in answer to the grievance of the petitioner that no exercise / inquiry had preceded the

enactment of the impugned Amendment Act of 2002, relevant correspondence / reports of the National Commission as well as the views of the Registrar General of India were produced, at Annexure "I" collectively to that affidavit, pointing out that the Registrar General of India had, after referring to the pros and cons, ultimately recommended : " Taking the circumstances into consideration, there would be no objection to the area restriction being re-imposed in this case". It is also pointed out that, on 31st March 1999, the Government of India forwarded the recommendations of the State Government and the views of the Registrar General of India on re-imposition of area restrictions for the Mochi community of Gujarat to the National Commission for Scheduled Castes and Scheduled Tribes inviting its comments as required under Article 338 of the Constitution of India. The National Commission for Scheduled Castes / Scheduled Tribes, by its communication dated 25-1-2000, informed the Government of India that the issue was discussed in the Commission's meeting held on 14-1-2000 and the Commission concurred with the State Government's proposal to re-impose the area restriction in the case of "Mochi" community of Gujarat in the list of Scheduled Castes as listed before 1976 i.e. Mochi community in Gujarat may be treated as Scheduled Caste only in Dangs district and Umargaon Taluka of Valsad district. Thereafter, the Government of India sought a clarification by its letter dated 2-7-2001 from the State Government, whether the Mochi community will be included in the list of Other Backward Classes (OBC) for the other parts of the State, to which, the State Government sent a reply on 30-7-2001 that, after having examined the issue, the State Government had decided that if the Mochi community is excluded from the list of Scheduled Castes in Gujarat State, except Dangs district and Umargaon Taluka of Valsad district, the Mochi community will be included in the list of Other Backward Classes (OBC) i.e. Socially and Educationally Backward Classes (SEBC) in the Gujarat State, except Dangs district and Umargaon Taluka in Valsad district. The Government requested for restoring the area restriction in the case of Mochi community as it existed prior to 1976. It is pointed out that, by communication dated 27-3-2000 sent by the State of Gujarat to the Government of India, it was stated in paragraph 4 that, till about the re-organisation of the States and the creation of a separate State of Gujarat, Mochi community was considered as Scheduled Caste in certain specified areas of present Maharashtra State and not in the then Gujarat Division. The reason for this was that, as indicated in the note, people belonging to Mochi community in Gujarat were never treated as

untouchables. Since untouchability is the criterion for deciding whether a particular community belonged to the Scheduled Castes or not, Mochis were never considered as Scheduled Caste in the areas of the present day Gujarat till the time of the re-organisation of the States. It is pointed out from the Report of the National Commission for Scheduled Castes and Scheduled Tribes, 1993-94, attached to this affidavit that, as per paragraph 6.67 thereof, the Commission felt that the removal of area restrictions in respect of certain castes / tribes in different States has done more harm to the genuine Scheduled Castes & Scheduled Tribes than providing any relief to them. In order to ensure that the benefits of reservation and other relaxations / concessions made available to Scheduled Castes & Scheduled Tribes are availed of only by genuine members of these groups which were initially so specified in relation to certain areas, based on historical and social factors, the Government of India should review the whole question to reimpose the area restrictions.

5.3 The petitioner, in its rejoinders, has maintained its stand taken in the petition considering the averments made by the authorities in their replies and sur-rejoinders.

5.4 The respondent No.10, by affidavit-in-reply dated 21st July 2003, has supported the petitioner's case. The other respondents have opposed the petition and in their affidavits, they have raised various contentions besides the contentions raised on behalf of the respondents Nos. 1, 2 and 3 and have also elaborately delved into the justification of imposition of area restriction, contending that, the Mochi caste, even as per the inclusion under the Amendment Act of 1976, had reference only to Mochis of Dangs district and Umargaon Taluka on the principle of affinity. These affidavits have been extensively referred to by the learned counsel representing those respondents and it will be unnecessary to re-produce their contents.

Arguments and Citations :

6. It has been contended by the learned Senior Counsel appearing on behalf of the petitioner that the legislative power of the Parliament under Article 341(2) of the Constitution is of special nature hedged by special limits and considerations, and is not a plenary power. When the Constitution reposes on any authority a special obligation, then it constitutes power coupled with duty. The scope of judicial review in such cases is

wider than what is available in the context of the plenary legislation enacted by the Parliament. It was contended that the aspect of judicial review of an Act enacted under Article 341(2) is quite different from the question of considering whether a section of the community falls within a notified scheduled caste which was like the process of blood grouping. Therefore, the decisions of the Apex Court laying down that the inclusion in or exclusion from the list of Scheduled Castes cannot be ordered, are not applicable to the nature of challenge raised against the constitutionality of the impugned Amendment Act of 2002. It was argued that the Supreme court in those cases never decided whether judicial review will lie, under Article 14, of the Amendment Act passed by the Parliament under Article 341(2), and that the cases decided by the Supreme Court were mostly election cases. It was submitted that the extent of judicial review was wider in the context of the provisions of law made under Article 341(2) and it was required to be considered whether the duty sought to be imposed was duly discharged. It was submitted that the test laid down by the Apex Court in Barium Chemicals case (reported in AIR 1967 SC 295), for adjudging the validity of administrative action, was required to be applied in the present case. It was submitted that, when direct and inevitable effect is on the fundamental rights, it was not enough to examine whether the law was facially correct, and special scrutiny was called for to find out as to how discerningly the matter was examined by the concerned authority. It was submitted that special powers require special considerations and majoritarianism is not the answer in such cases. Moreover, exclusion of a community, which is placed in the list of Scheduled Castes, will require a still greater scrutiny to find out whether requirements for exclusion are met and the doctrine of proportionality is not violated. It was submitted that, prima facie, exclusion requires justification and such justification has to be reasonable. The justification should be anterior justification and there should be meaningful exercise of powers in that context. It was submitted that, in the present case, the question of social inequality of Mochi caste was not addressed to by the State Government and it acted only as a post office by sending the proposal to the Government of India. It was contended that there were no changed circumstances after the Amendment Act of 1976 justifying reimposition of the area restriction and mere letters darted by the State Government, by themselves, cannot be described as a change in circumstances. It was also submitted that, in the affidavits, the respondent No.1 had described Mochis of

other areas as equally backward and no material existed to show that any inquiry was made by the State Government indicative of any changed circumstances. It was also submitted that there was nothing to show that there was any meaningful consultation with the Commission. It was then argued that the provisions of the impugned Amendment Act were discriminatory in effect and since law under Article 341 was a `law' within the Article 13(2), bar of Section 341 was not a "judicial hands off", but was only for a limited purpose and must be construed as such. Moreover, the purpose of Article 341 and its amplitude were to be read alongwith Articles 15, 16, 38, 46, 243(D), 243(T) and Part 16 of the Constitution. When read in this light, the power under Article 341 is intended to achieve the constitutional objective as contra-distinguished from mere public policy. The constitutional objective is to achieve a comprehensive social equality which itself was a part of equality and not an exception to it. Since the power under Article 341 was coupled with duty, a strict scrutiny test was required to ensure whether in exercise of this power, there was an adequate mechanism in order to examine the issue of equality, and whether the substantive issue pertaining to equal / unequal status were properly, adequately and meaningfully addressed.

6.1 The learned advocate on record for the petitioner, in reply, supplemented the arguments of the learned Senior counsel, by contending that the duty, while exercising the power under Article 341(2), was to ensure that there was an objective determination of the social conditions of the caste before its inclusion or exclusion was done. This exercise of objective determination is mandatory for the observance of the golden principle underlying scheduling, that the eligible must get and the underserving excluded. For this purpose, evidence was required to be collected for an objective determination, and, then, there would be the question of applying the criteria for inclusion in the list of Scheduled Castes. Such an exercise was anterior to the proceedings in the Parliament and therefore, Article 122 of the Constitution had no play. If the exercise is missed, the duty is sacrified at the altar of power and the exercise of power under Article 341 (2), without reference to the duty, becomes bad. When there is no prior objective determination, there is no basis for exercising power under Article 341(2) and the Courts can always scrutinise whether an objective determination of social conditions of a caste has taken place before any recommendation of inclusion / exclusion is made. If on such scrutiny the Court concluded that it was not

there, then the Court can hold that the Parliament had no basis for exercising that power and the enactment was, therefore, arbitrary. It was also submitted that historical facts could not have been relied upon for enacting the Amendment Act of 2002, because, the Parliament was presumed to have known their existence even when the Amendment Act of 1976 was passed on 27th July 1977. Moreover, the letters written after 27th July 1977 by the State Government cannot come to the aid of the Union of India, because, they do not amount to any changed circumstances. No material to show any changed circumstances is brought on record and therefore, the impugned Amendment Act of 2002 was an arbitrary exercise of power, violating the fundamental rights of the members of the Mochi community guaranteed by Article 14 of the Constitution of India.

6.2 In support of the above contentions, reliance has been placed by the learned Senior Counsel for the petitioner on the following decisions :

[a] The decision of the Supreme Court in H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur v. Union of India, reported in AIR 1971 SC 530, was cited to point out that, in paragraph 115 of the judgement, the Supreme Court, while considering the analogous provisions in the Constitution conferring upon the President a power coupled with a duty, has referred to Articles 341 and 342 to specify scheduled castes and scheduled tribes, and it was observed that if power to declare certain classes of citizens as belonging to Scheduled Castes and Scheduled Tribes includes power to withdraw declaration without substituting a fresh declaration, the President will be destroying the constitutional scheme. The power to specify may carry with it the power to withdraw specifications, but it is coupled with a duty to specify in a manner which makes the constitutional provisions operative. This would mean that when there is a power conferred to specify the Scheduled Castes in the context of the other provisions of the Constitution, such as, Articles 330 and 332, the President cannot refuse to specify Scheduled Castes, because, there is a duty to specify in the context of the other provisions of the Constitution which can operate only when the Scheduled Castes are specified apart from the benefits which may be extended by virtue of other

constitutional provisions to those who are included in the Scheduled Castes.

[b] Reliance was placed on the decision of the Supreme Court in Commissioner of Police v. Gordhandas Bhanji, reported in AIR 1952 SC 16, to point out that, in paragraphs 27 and 28 of the judgement, the Supreme Court, after referring to the observations of Earl Cairns L.C. in the House of Lords in Julius v. Lord Bishop of Oxford, (1880) 5 A.C. 214, held that the discretion vested in the Commissioner of Police under Rule 250 had been conferred upon him for public reasons involving the convenience, safety, morality and welfare of the public at large. An enabling power of this kind conferred for public reasons and for the public benefit was, in the opinion of the Court, coupled with a duty to exercise it when the circumstances so demand.

[c] The decision of the Supreme Court in State of Maharashtra v. Milind and others, reported in AIR 2001 SC 393, was cited with a view to point out that the ratio of the decision as reflected in paragraphs 27 and 35 of the judgement, was that no enquiry is permissible and no evidence can be let in, to find out and decide that if any tribe or tribal community or part of or group within any tribe or tribal community is included within the scope and meaning of the concerned Entry in the Presidential Order when it is not so expressly or specifically included, and that the decision did not lay down that no constitutional challenge can be raised against the law made under Article 341(2).

[d] The decision of the Supreme Court in Shri Ram Krishna Dalmia v. Shri Justice S.R.Tendolkar, reported in AIR 1958 SC 538, was cited for the proposition that Article 14 protects all persons from discrimination by the legislative as well as by the executive organs of the State and the `law' as defined in Article 13 would include any notification or order. Therefore, it is open to a person aggrieved to question the constitutionality of a notification.

[e] The decision of the Supreme Court in State of Rajasthan v. Rao Manohar Singhi, reported in AIR 1954 SC 297, was cited to point out that the Supreme Court, while holding that Section 8A of

the United State of Rajasthan Jagirdars (Abolition of Powers) Ordinance (27 of 1948) was in clear contravention of the respondent's right under Article 14 of the Constitution and must be declared void, observed that there was no real and substantial distinction why the Jagirdars of a particular area should continue to be treated with inequality as compared with the Jagirdars in another area of Rajasthan, and no rational basis for any classification or differentiation had been made out.

[f] The decision of the Supreme Court in Karimbil Kunhikoman v. State of Kerala, reported in AIR 1962 SC 723, was cited for the proposition reflected in paragraph 24 of the judgement that the discriminatory nature of the provision has to be judged from the results that follow from it. It was held that the results which followed from the double provision as to ceiling under Section 58 of the Kerala Agrarian Relations Act, 1961 fixing the ceiling were in two ways discriminatory. The ceiling was fixed in Section 58 by a double standard and over and above that, the family had been given an artificial definition which did not correspond with a natural family as known to personal law.

[g] The decision of the Supreme Court in Col. A.S.Iyer v. V. Balasubramanyam, reported in AIR 1980 SC 452, was cited to point out that, in paragraph 57 of the judgement, after referring to the observations of Justice Subba Rao in Lachhman Das v. State of Punjab, [(1962) 2 SCR 353], that the doctrine of classification was only a subsidiary rule evolved by courts to give a practical content to the said doctrine and the observations of Justice Bose in Bidi Supply Co. case, [1956 SCR 267], to the effect that Article 14 sets out an attitude of mind, a way of life, rather than a precise rule of law, and it embodied a general awareness in the consciousness of the people at large of something that exists and which is very real but which cannot be pinned down to any precise analysis of fact save to say in a given case that it falls this side of the line or that, proceeded to observe in paragraph 58 that the constitutional goal was to break down inequalities steadily between man and man, whether based on status or talent. Masses of men have suffered so long from social suppressions

and environmental inhibitions and to deliver them out of such stratification and petrification came the message of social justice, blowing like winds of change, with a accent on distributive justice ensured by the rule of real equal opportunity.

[h] The decision of the Supreme Court in Indra Sawhney v. Union of India, reported in 1992 Supp. (3) SCC 217, was cited to point out that, in paragraph 642 of the judgement, the Court observed that the doctrine of equality had many facets, and that it is a dynamic and an evolving concept. Its main facets, were referred to in the preamble and Articles 14 to 18 under the sub-heading "Right to equality" and the goal was "equality of status and of opportunity". Articles 14 to 18 must be understood not merely with reference to what they say but also in the light of the several Articles in Part IV (Directive Principles of State Policy). In paragraph 764 of the judgement, the Supreme Court referred to its earlier decision in which E.S. Venkataramiah, J. opined that an examination of the question in the background of the Indian social conditions shows that the expression "backward classes" used in the Constitution referred only to those who were born in particular caste, or who belong to particular races or tribes or religious minorities which were backward. It will be seen that, in paragraph 855 of the judgement, the Supreme Court observed that the directions made in the judgement for constitution of a permanent Commission to examine complaints of over-inclusion or under-inclusion obviated the need of any such scrutiny by the Court.

[i] The decision of the Supreme Court in Indra Sawhney v. Union of India, reported in (2000)1 SCC 168, was cited for the proposition that the inclusion of castes in Backward Classes cannot be done mechanically or without adequate relevant data, nor can it be done for extraneous reasons.

[j] The decision of the Supreme Court in Union of India v. G. Ganayutham, reported in (1997)7 SCC 463, was cited to point out that, in paragraph 22 of the judgement, it was held that the statute can be struck down if the restrictions imposed by it are disproportionate or excessive having regard to the purpose of the statute and that the

Court can go into the question whether there is a proper balancing of the fundamental right and the restriction imposed.

[k] The decision of the Supreme Court in M/s Teri Oat Estates (P) Ltd. v. U.P. Chandigarh, reported in 2003 (10) SCALE 1016, was cited to point out that, in paragraph 47 of the judgement, the Supreme Court approvingly referred to the ratio of the decision in State of Madras v. V.G.Row (AIR 1952 SC 196) to the effect that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time should all enter into the judicial verdict.

7. The learned counsel "representing" the learned Attorney General contended that the expression "Scheduled Castes" was defined in Article 366(24) of the Constitution and the List of the Scheduled Castes published by notification of the President was a part of that definition and that the impugned Amendment Act only made a change in the definition of the Scheduled Castes by excluding the Mochis in Gujarat of areas other than the areas of Dangs district and Umargam Taluka of Valsad district. The purpose of specifying the Scheduled Castes in the List by a Presidential notification issued under Article 341(1) was merely to indicate the categories eligible for affirmative action and no more. There is no right to such affirmative action which can be claimed by the petitioner. It was submitted that Articles 15(4) and 16(4) were enabling provisions and no writ will lie at the instance of anyone for claiming the benefits, because, no semblance of right lies in a person who is not in List of Scheduled Castes. Also, when protective discrimination under Article 15(4) and 16(4) are aspects of the right to equality under Article 14, it cannot be again pressed into service for a claim to be chosen for protective discrimination. It was then contended that, assuming that Article 14 was available for their challenge to the petitioner, the question of inclusion in or exclusion from the List of Scheduled Castes would not be gone into by the Constitutional Court, because, the question did not have an adjudicatory disposition. He

reminded us that the constitutional rights are not only protected by the Courts, but they are protected by other organs also. The National Commission created under Article 338 was specifically charged with such functions. Moreover, the State, by prescribing the modalities, had bound itself to have any proposal sanctioned or agreed to by three different bodies, namely, the State Government, the Registrar General of India and the National Commission for Scheduled Castes and Scheduled Tribes. This exercise having been done in the consultative process, no further scrutiny was necessary or called for by the Court. It was submitted that the constitutional body namely, the National Commission, in its reports (paragraph 12 of Report of 1986 - 87 and paragraph 6.67 of the Report of 1993-94) had taken a view in favour of the area restriction in respect of the said community. The National Commission had expressed its views firmly formulated and crystallized in their communication to the Government of India in respect of the impugned Amendment Act. It was further submitted that the distinguishing feature for inclusion in the list of Scheduled Castes was the taint of untouchability. Though all Mochis were equally backward, socially and educationally, it was the backwardness in case of those in Dangs district and Umargam Taluka of Valsad district, which was flowing from the taint of untouchability and therefore, the distinction between these two classes was justified and based on a rational criteria having nexus with the object sought to be achieved by the provisions of Article 341 and other provisions of the Constitution having bearing on the claims of persons belonging to such Scheduled Castes. It was submitted that soon after the Amendment Act of 1976, the issue regarding re-imposition of area restriction was raised, and in fact was the subject matter of the Amendment Bill of 1978, which came to be lapsed.

7.1 In support of his contentions, the learned counsel placed reliance on the following decisions :

[a] The decision of the Supreme Court in State of Maharashtra v. Milind, reported in (2001)1 SCC 4, was cited for the proposition that the Parliament alone is competent by law to include in or exclude a caste / tribe from the list of Scheduled Castes and Scheduled Tribes specified in notifications issued under clause (1) of the Articles 341 and 342. The President is authorized to limit the notification to parts or groups within the caste or tribe depending on the

educational and social backwardness. It was held that: "It is permissible that only parts or groups within them be specified and further to specify castes or tribes thereof in relation to parts of the State and not to the entire State on being satisfied that it was necessary to do so having regard to social and educational backwardness." The Supreme Court held that: " .... no inquiry is permissible and no evidence can be let in for establishing that a particular caste or part or group within tribes or tribe is included in Presidential Order if they are not expressly included in the Order. Since any exercise or attempt to amend the Presidential Order except as provided in clause (2) of Articles 341 and 342 would be futile, holding any inquiry or letting in any evidence in that regard is neither permissible nor useful."

[b] The decision of the Supreme Court in B. Basavalingappa v. D. Munichinnappa, reported in AIR 1965 SC 1269, was cited for the proposition that it is not open to make any modification in the Order by producing evidence to show (for example) that though caste A alone is mentioned in the Order, caste B is also a part of caste A and, therefore, must be deemed to be included in caste A. The Court held that, generally speaking, it would not be open to any person to lead evidence to establish that caste B is part of caste A notified in the Order.

[c] The decision of the Supreme Court in Srish Kumar Choudhury v. State of Tripura, reported in 1990 (Supp) SCC 220, was referred to for the proposition that the entries in the Presidential Order have to be taken as final and the scope of enquiry and admissibility of evidence is confined within the limitations indicated in the earlier decisions of the Court. (See paragraph 16 of the judgement).

[d] The decision of the Supreme Court in Palghat Jilla Thandan Samudhaya Samrakshna Samithi v. State of Kerala, reported in (1994)1 SCC 359, was cited for the proposition that the Scheduled castes Order has to be applied as it stands and no enquiry can be held or evidence let in to determine whether or not some particular community falls within it or outside it. No action to modify the plain effect of the

Scheduled Castes Order, except as contemplated by Article 341, is valid. It was held that it is not open to the State Government or for the Supreme Court to inquire into the correctness of what is stated in the report that has been made thereon or to utilize the report to, in effect, modify the Scheduled Castes Order. (See paragraphs 18 and 21 of the judgement).

[e] The decision of the Supreme Court in Ajit Singh v. State of Punjab, reported in (1999)7 SCC 209, was cited for pointing out that, in paragraph 32 of the judgement, the Supreme Court held that if the State is of the opinion that in the interests of efficiency of administration, reservation or relaxation in marks is not appropriate, then it will not be permissible for the Court to issue a mandamus to provide for reservation or relaxation. It was held that the decisions in Jagannathan case, [(1986) 2 SCC 679], and Kuldeep Singh case, [(1997) 9 SCC 199], holding that a mandamus can be issued either to provide for reservation or for relaxation was not correct and the view expressed therein ran counter to judgements of earlier Constitution Benches in C.A.Rajendran v. Union of India, [AIR 1968 SC 507], and M.R.Balaji v. State of Mysore, reported in [AIR 1963 SC 649], that Article 16(4) confers a discretion and did not create any constitutional duty or obligation which could be enforced by issuing a writ of mandamus.

8. The learned Additional Advocate General, appearing for the respondent No.1 - Union of India, adopting the arguments of learned advocate representing the learned Attorney General, further submitted that series of proposals, representations and letters, which are brought on record, received by the Union of India after the Amendment Act of 1976, constituted changed circumstances. It was submitted that, on the basis of the communications received by the Union of India, a Bill seeking to re-impose area restriction specifying Mochi community as Scheduled Caste only in Dangs district and Umargaon Taluka of Valsad district was introduced in 1978. However, since the Joint Select Committee, to which it was referred, ceased to exist after the dissolution of the Fifth Lok Sabha in 1979, the Bill could not be passed. It was submitted that, even the National Commission for Scheduled Castes and Scheduled Tribes, in its Third Report (1980 - 1981) as well as the Registrar General of India, in his letter addressed to

the Central Government on 8-3-1981, and the State Government in its letter dated 20-10-1981, had recommended re-imposition of the area restriction. The Commissioner for Scheduled Castes & Scheduled Tribes, in his Twenty-Eighth Report (1986 - 1987), reiterated the earlier recommendations for re-imposition of area restriction in the State in case of Mochi community. It was pointed out that, even in the affidavit which was filed before the Supreme court in Special Leave Petition (Civil) No. 2151 of 1988 on 13-12-1988, a copy of which is on record, it was stated that the Amendment Act of 1976 removing area restriction in Gujarat was passed since the Gujarat Government did not furnish any suggestions or objections. In the report of Shri B.D.Sharma, Commissioner for Scheduled Castes and Scheduled Tribes, to the President of India sent on 23-11-1988, a copy of which is on record, the Commissioner recommended re-imposition of area restriction in the State in case of Mochi community since, in 1976, an adhoc decision to remove this restriction was taken. It was further pointed out that the National Commission for Scheduled Castes and Scheduled Tribes, in its Second Annual Report (1993-94) recommended re-imposition of area restriction in the State in case of Mochi community. It was argued that, in June 1999, the Government of India approved and finalized the modalities for deciding the inclusion and exclusion etc. in the Orders specifying Scheduled Castes and Scheduled Tribes. The Central Government had requested for the views on the State Government's proposal, by communication dated 31st March 1999 and the National Commission had conveyed its concurrence on 25-1-2000 to the Central Government in respect of the State Government's proposal for re-imposition of area restriction in case of Mochi community. The State Government wrote to the Central Government a detailed letter on 27-3-2000, referring to an exhaustive note sent to the Central Government justifying the urgent need for re-imposition of the area restriction in the State of Gujarat in case of Mochi community. The Central Government, thereafter, sought clarification on 27-10-2001 from the State Government as to whether on re-imposition of area restriction, other Mochis will be included in the list of O.B.C. for the other parts of the State. The State Government, on 30th July 2001, responded that except Mochis of Dangs district and Umargaon Taluka of Valsad district, the Mochi community of the State will be included in the list of O.B.C. According to the learned Additional Advocate General, both these events took place after the Amendment Act, 1976 and it was open for the Parliament to make the

Amendment Act of 2002 by imposing area restriction in respect of Mochi community for inclusion in the list of Scheduled Castes. It was submitted that there was a presumption in favour of the constitutionality of a statute which may not be lightly disturbed.

8.1 In support of his contentions, the learned Additional Advocate General relied upon the following decisions :

[a] The decision of the Supreme Court in Union of India v. Elphinstone Spinning and Weaving Co. Ltd., reported in AIR 2001 SC 724, was cited to point out that, in paragraph 9 of the judgement, it has been held that a statute is construed so as to make it effective and operative, and that, there is always a presumption that the legislature does not exceed its jurisdiction and the burden of establishing that the legislature has transgressed constitutional mandates such as, those relating to fundamental rights is always on the person who challenges its vires. Unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will. It was observed that, once a statute leaves Parliament House, the Court is the only authentic voice which may echo the Parliament. The Court will do this by a reference to the language of the statute and other permissible aid. It was held that no Act of Parliament may be struck down because of the understanding or misunderstanding of parliamentary intention by the executive Government or because their spokesmen do not bring out relevant circumstances but indulge in empty and self-defeating affidavits.

[b] The decision of the Supreme Court in State of Maharashtra v. Milind, reported in AIR 2001 SC 393, was cited for the proposition that the Scheduled Tribes Order must be read as it is, and that it is not even permissible to say that a tribe, sub-tribe, part or group of any tribe or tribal community is synonymous to the one mentioned in the Scheduled Tribes Order if they are not so specifically mentioned in it. It is also not at all permissible to hold any enquiry or let in any evidence to decide or declare that

any tribe or tribal community or part of or group within any tribe or tribal community is included in the general name even though it is not specifically mentioned in the concerned entry in the Constitution (Scheduled Tribes) Order, 1950. (See paragraph 35 of the judgement).

[c] The decision of the Supreme Court in Satish Chandra v. Union of India, reported in AIR 1995 SC 138, was cited to point out that it was held in paragraph 5 of the judgement, while repelling the contention that the Parliament itself had once made an experiment with establishment of such a Board earlier by enacting Amendment Act of 1963, that : "The failure of the experiment may not be treated sufficient by the Parliament not to try again. In any case, this is a question relatable to the wisdom of the Parliament which is not amenable to examination by a Court when seized with the constitutionality of the provision."

[d] The decision of the Supreme Court in Delhi Science Forum v. Union of India, reported in AIR 1996 SC 1356, was cited for the proposition that policies which have been adopted by the Parliament cannot be tested in Court of Law. It was held in paragraph 5 of the judgement that the Courts have their limitations - because these issues rest with the policy makers for the nation and no direction can be given or is expected from the Courts unless while implementing such policies, there is violation or infringement of any of the Constitutional or statutory provision.

[f] The decision of the Supreme Court in Rustom Cavasjee Cooper v. Union of India, reported in 1970 (1) SCC 248, was cited for the proposition as reflected from paragraph 63 of the judgement that, it was not for the Court to consider the relative merits of the different political theories or economic policies. The Court has the power to strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of the Parliament in enacting a law.

[g] The decision of a Division Bench of this Court in Gujarat Dalit Civil & Constitutional Rights Pratipadan Samiti, v. Union of India, reported in XXIX (1) G.L.R. 290, which has been heavily

relied upon by the petitioner, was referred to in order to point out that, in paragraph 16 of the judgement, it was clearly noted that the Government of Gujarat, subsequent to the passing of the Scheduled Castes Scheduled Tribes Orders (Amendment) Act, 1976 represented to the Government of India stating that the removal of area restriction in the case of Mochi community was not justified because this community had never suffered from any disability arising out of the practice of untouchability in any part of Gujarat State, except the Dangs district and Umergaon Taluka of the Valsad district.

9. The learned Advocate General appearing for the respondents Nos. 2 and 3, adopting the contentions of the representative of the learned Attorney General and those raised on behalf of the Union of India, further contended that, right from March 1930 till the Amendment Act of 1976 came to be made, Mochi community was specified as Scheduled Caste only in the specified areas. He referred to the Report of Starte Commission of March 1930, Schedule 5 of the Government of India Act, 1935, the Constitution Schedule Castes Order, 1950, Scheduled Castes / Scheduled Tribes Modifications Order, 1956, and Bombay Re-organisation Act, 1956, to point out that the area restriction in respect of Mochi community always existed. He submitted that this was on the ground that Mochi community of these areas of Dangs district and Umargaon Taluka of Valsad district was suffering from the disability of the practice of untouchability. He also pointed out from the Baxi Commission Report the terms of its reference and that, in paragraph 4, under sub-head `Mochi', it was clearly mentioned that Mochis were considered as Scheduled Caste in the Dangs districts and Umargaon Taluka of Valsad district, and that, in the former State of Bombay as well as in the State of Saurashtra, the Gujarati Mochis were treated as Other Backward Classes.

9.1 The learned Advocate General relied upon the following decisions in support of his contentions :

[a] The decision of the Supreme Court in State of Andhra Pradesh v. McDowell and Co., reported in AIR 1996 SC 1627, was cited to point out that, in paragraph 45 of the judgement, the Supreme Court held that if an enactment is challenged as violative of any of the fundamental rights guaranteed by Clauses (a) to (g) of Article

19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and no enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that Court thinks if unjustified. The Parliament and the Legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The Court cannot sit in judgement over their wisdom.

[b] The decision of the Supreme Court in T. Venkata Reddy v. State of Andhra Pradesh, reported in AIR 1985 SC 724, was cited for the proposition that, while the Courts can declare a statute as unconstitutional when it transgresses constitutional limits, they are precluded from inquiring into the propriety of the exercise of the legislative power. It has to be assumed that the legislative discretion is properly exercised. The motive of the legislature in passing a statute is beyond the scrutiny of courts. Nor can the courts examine whether the legislature had applied its mind to the provisions of a statute before passing it. The propriety, expediency and necessity of a legislative act are for the determination of the legislative authority and are not for determination by the Courts. It was held that an Ordinance passed under Article 123 or under Article 213 of the Constitution stands on the same footing.

[c] The decision of the Supreme Court in Gurudevdatta VKSSS Maryadit v. State of Maharashtra, reported in AIR 2001 SC 1980, was cited for the proposition that the action of promulgation of Ordinance under Article 123 or 213 is legislative in character, and not an administrative or executive action. Being legislative in nature, it is subject only to constitutional limitations applicable to an ordinary statute. The Ordinance, if it does not infringe the constitutional safeguards, cannot be examined nor the motive for such a promulgation can be in question. The Courts cannot infer a legislative malice in passing a statute.

10. The learned counsel for the respondents Nos. 6,

7, 8 and 12, supporting the stand taken by the respondents authorities further argued that the terms of reference of the Baxi Commission were not in respect of identifying Scheduled Castes and that the Baxi Commission Report was never before the Parliament when the earlier Amendment Act of 1976 was made. It was submitted that the decision rendered by the High Court in the context of the Amendment Act of 1976 could not have precluded the Parliament from enacting the impugned Amendment Act of 2002 for imposing area restriction for Mochi community as it always existed prior to the Amendment Act of 1976, so as to exclude Mochi caste of areas other than Dangs district and Umargaon Taluka of Valsad district, because, Mochi caste was grouped in Entry 4 with other scheduled castes and was required to be construed on the principle of affinity. Therefore, only Mochis of Dangs district and Umargaon Taluka, who were treated as untouchables like the other castes grouped under Entry 4, who were also treated as untouchables were meant to be included in the list. There was no scope for reading Mochis of other areas in Gujarat who were not treated as untouchables in the said Entry. It was argued that the said challenge against the Presidential Order as amended by the Amendment Act 2002 was in reality a challenge against a constitutional provision, because, by virtue of Article 366(24), the list of Scheduled Castes as notified and amended under Article 341 became part of that definition clause and therefore, a constitutional provision. The learned counsel referred to the affidavits of M.K.Champaneri and R.M. Champaneri which are on record to point out that incongruous stand was taken by them and that errors of fact as set out in paragraph 1.2 of the affidavit in reply of the respondent No.8 had crept in, because, the correct facts were not brought to the notice of the Division Bench in Special Civil Application No. 3432 of 1985, as pointed out in paragraph 1.2 (c) of the affidavit of the respondent No.8, affirmed on 16th July 2003. The learned counsel also argued that the impugned Amendment Act was protected by the provisions of Article 122 of the Constitution. According to him, in the law making process under Article 342(1), even the President was a partner, having given his assent. It was further submitted that parts or groups within the castes could be notified as scheduled castes and it was not necessary that the entire caste in the whole area of the State should be notified as a Scheduled Caste.

10.1 The learned counsel has placed reliance upon the following decisions in support of his contentions :

[a] Reliance was placed on the decision of the Supreme Court in Dadaji alias Dina v. Sukhdeobabu, reported in (1980)1 SCC 621, to point out that, it was held in paragraph 14 of the judgement that : "A reading of the Schedule to the Order also shows that where there are two communities with the same name, one having affinity with a tribe and the other not having anything to do with such tribe and both are treated as scheduled Tribes, the community which has affinity with another tribe is shown along with it in the same group against a single entry and the other is shown against a different entry."

[b] The decision of the Madras High Court in S. Ananthakrishnan v. The State of Madras, reported in AIR 1952 Madras 393, was cited to point out that, in paragraph 41 of the judgement, it was held that Article 13 applies only to those two classes of laws that are declared void as against the provisions of Part III and it did not apply to the Constitution itself. Article 13 cannot be read so as to render any portion of the Constitution invalid.

[c] The decision of the Himachal Pradesh High Court in Moti Ram v. Union of India, reported in AIR 1966 H.P. 25, was cited for the proposition as reflected in paragraphs 22 and 23 of the judgement that, when the differentiation between the States and Union territories has been made, in almost all spheres by the Constitution itself, such a differentiation cannot be struck down, under Article 14, as no provision of the Constitution can be considered as being contravening any other provision of the Constitution. It was held that the differentiation, resulting, from the provisions of Section 54 of the Government of Union Territories Act, between a State and a Union territory, has really been made by the provisions of the Constitution, itself. and it cannot be regarded to offend against the provisions of Article 14 of the Constitution.

11. The learned counsel appearing for the respondent No.11 referred to the test evolved by J.Hutton, the 1931 Census Commissioner, in his Report and submitted that

`untouchability' was an accepted criterion for inclusion of a caste in the list of the Scheduled Castes. The criteria, by which to identify untouchable groups, were referred from the excerpts of the Publication "Competing Equalities" by Marc Galentor.

11.1 The learned counsel for the respondent No.9, thunderously submitted that when the Amendment Act of 1976 was passed, the Gujarat Government had not submitted its comments and it was due to such lapse that the Act came to be passed. He argued that innumerable certificates were on record to show that Mochis in other parts of Gujarat were being attended to by Brahmin community and therefore, they were not treated as untouchables. He submitted that Baxi Commission could not have made any recommendations in respect of the Scheduled Castes, because, it was constituted for the purpose of identifying the Other Backward Classes, and not for suggesting inclusions in the Scheduled Castes. It was pointed out that the objects of the petitioner public trust did not include any object or aim of removal of untouchability. It was pointed out that there were no conversions prevalent in Mochi community in other parts of Gujarat, because, they were not treated as untouchables and conversions were noticed only in the castes which were treated as untouchables. It was submitted that the Mochis of other areas were treating the Scheduled Castes members as untouchables. He referred to the three affidavits filed on behalf of the respondent No.9 for pointing out the distinguishing features between the Mochis of other areas of Gujarat and the Mochis who were treated as untouchables in the Dangs district and Umargaon Taluka of Valsad district and submitted that there was absolutely no warrant for interfering with the area restriction which was re-imposed in respect of the Mochi community under the Amendment Act of 2002 by specifying only Mochis of Dangs district and Umargaon Taluka of Valsad district as a Scheduled Caste in Entry 4 of the Schedule to the Order of 1950. He submitted that the Parliament has jurisdiction to include in or exclude from the List of Scheduled castes and referred to paragraph 20 of the affidvit-in-reply of the respondent No.9 to point out that 33 decisions of the Apex Court were mentioned therein in support of his submissions.

12. The learned counsel appearing for the respondent No.5 contended that procedure of making ordinary law was required to be followed even in making the Amendment Act of 2002 under Article 341(2) and challenge against such a law can be raised only on the grounds of legislative

incompetence or violation of any fundamental rights. He submitted that policy making is an attribute of the executive and not the legislature and there can be no legislative policy, but only executive policy. He submitted that the wisdom of the legislature cannot be questioned. He referred to review of amendment of Presidential Orders from Chapter 9 of the 28th Report of the Commissioner for Scheduled Castes & Scheduled Tribes (1986-87) for pointing out that the removal of area restriction had resulted in some anomalous situation (See paragraph 12 of that Report at Annexure "P1").

Reasoning :

13. The petitioner seeks a declaration that the exclusion of Mochis outside Dangs district and Umargaon Taluka of Valsad district from Schedule I to the Constitution (Schedule castes) Order, 1950 by the Constitution (Scheduled Castes) Orders (Second Amendment) Act, 2002 is violative of Articles 14, 15, 16, 19 and 341 of the Constitution and therefore, null and void, and that amended entry 4 in Part IV of the Order of 1950 relating to Gujarat is unconstitutional and void to the extent it "derecognises and despecifies" Mochis outside of Dangs district and Umargam Taluka of Valsad district.

14. Admittedly, prior to the Amendment Act of 1976, there was area restriction in respect of Mochis and Mochis of the Gujarat Division of the bigger bilingual State of Bombay were not specified as Scheduled castes. The report of the Bombay Scheduled Castes and Scheduled Tribes Committee headed by O.H.B. Starte, published in March 1930, classified in Scheduled II List 1 at item 31, Mochis, other than those who were not treated as untouchables in Gujarat, as Scheduled Castes. The Mochis who were not treated as untouchables in Gujarat were shown as O.B.C. at item 59 of List 3 of that Report (Pages 80 - 81 of the Report).

14.1 The Constitution (Scheduled Castes) Order, 1950 made by the President under Article 341(1) of the Constitution of India provided in clause 2 that, subject to the provisions of the Order, the castes, races or tribes specified in the Schedule to the Order shall in relation to the parts of States to which the entries relate, be deemed to be scheduled castes so far as regards the members thereof resident in the localities specified in relation to them in those parts of that schedule.

14.2 Under Clause 4 of the said Order, it was provided that: "Any reference in the Schedule to this Order to a district or other territorial division of a State shall be construed as reference to that district or other territorial division as existing on the 26th January 1950."

14.3 Part III of the Schedule to the Order of 1950 related to State of Bombay and at Clause 2 therein, Mochi caste was specified as Scheduled Caste throughout Bombay State except in Gujarat Division. Thus, Mochis of Gujarat were not recognized as a scheduled Caste and were specifically excluded by imposing area restriction under the Order of 1950.

14.4 In pursuance of Section 41 of the States Re-organisation Act, 1956 and Section 14 of the Bihar & West Bengal (Transfer of Territories) Act, 1956, the President of India made the Scheduled Castes and Scheduled Tribes Lists (Modification) Order, 1956 and, inter alia, modified the Order of 1950, in the manner and to the extent specified in Schedule 1. Part 2 of that Schedule related to the State of Bombay and as per Clause 2 thereof, only the "Mochi" caste in the districts of Greater Bombay, West Khandesh, East Khandesh, Dangs, Nasik, Ahamadnagar, Puna, Satara (North), Satara (South), Kolhapur, Solapur, Thana, Kolaba and Ratnagiri were specified as Scheduled Castes. This means that the Mochis who belonged to the specified areas alone were to be treated as Scheduled Castes and not all Mochi.

14.5 When the State of Bombay was re-organised in 1960, the State of Gujarat was formed under Section 3 of the Bombay Re-organisation Act, 1960, as per which, its territories, inter alia, comprised of "Dangs" and the villages in Umargaon Taluka of Thana district became part of the State of Gujarat. Under Section 26 of the Act of 1960, the Constitution (Scheduled Castes) Order, 1950 was amended as directed in Schedule 7 of that Act. Part 4 of the Order 1950 was substituted and with reference to the State of Gujarat, as per clause 2 thereof, only Mochi caste "in the districts of Dangs and Umargaon Taluka of Valsad district" was specified as Scheduled Caste, which means that the area restriction for recognition of Mochi caste as Scheduled Caste continued as before and Mochi caste of the other parts of Gujarat was not treated as Scheduled Caste.

15. In para 4, under the heading "Mochi" on page 87 of the Report of the Socially and Educationally Backward Class Commission, Volume 1, published by the Gujarat

State in 1976, it was mentioned that : "The Mochis are considered as scheduled caste in Dangs district and Umargaon Taluka of Balsar district. In the former State of Bombay as well as in the State of Saurashtra, the Gujarati Mochis were treated as Other Backward Class (O.B.C.)". With a view to provide for the inclusion in, and exclusion from the list of Scheduled Castes and Scheduled Tribes, of certain castes and tribes for the re-adjustment of the representation of the parliamentary and assembly constituencies in so far as such re-adjustment was necessitated by such inclusion or exclusion and for the matters connected therewith, the Parliament enacted the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976 on 18-9-1976 and the Order of 1950 was amended by Section 3 thereof in the manner and to the extent specified in the first schedule thereto. In part 4 of that schedule pertaining to Gujarat, `Mochi' caste (without mention of area restriction) was grouped alongwith the other castes at Entry 4.

16. On inclusion of `Mochi' caste in the list of Scheduled Castes specified in the Presidential Order of 1950 by the said Amendment Act, 1976, several representations are said to have been received from the members of the Scheduled Castes by the Government of Gujarat for re-imposing area restriction in respect of Mochi caste as it prevailed earlier on the ground that the Mochi caste elsewhere in Gujarat was not subjected to the practice of untouchability. The Directorate of Social Welfare, Gujarat, by letter dated 11-1-1977 (copy at Annexure R-II to the affidavit-in-reply of the respondents Nos. 2 and 3), giving a detailed account of the earlier lists not including the Mochi community as scheduled caste as it was never treated as untouchable in Gujarat and stating that : "the community was treated as caste Hindus and they had all the religious, social and other customs performed by caste Hindu Brahmin for them without any discrimination from other caste Hindu community", concluded in paragraph 14 as under :

> "14. It appears, therefore, that the matter requires immediate study by the State Government and if necessary, the facts stated above be brought to the notice of Ministry of Home Affairs, Government of India, that the "MOCHI" community was never treated as Scheduled Caste in the area of eighteen districts out of nineteen and in 183 Talukas out of 184 Talukas of the

State and hence, the community as they did not suffer from the disability arising out of untouchability in the 183 Talukas consisting of 18 Districts of the State out of 19 Districts, and therefore, if it is included by some error of representation, the same may please be corrected by excluding the said community from the revised list of Scheduled Castes which may be brought into operation by an Act revising the list of Scheduled Castes and Scheduled Tribes by government of India, in respect of the Gujarat State."

16.1 Thereafter, on 11-5-1977, the Government of Gujarat wrote to Government of India, Ministry of Home Affairs that Mochi community was never included in the list of Scheduled Castes in Gujarat except for the incoming area from Maharashtra viz. Dangs district, and Umargaon Taluka now forming the part of Valsad District. The State Government while proposing that the area restriction for Mochi community in relation to the Dangs district and Umargaon Taluka of Valsad district should be restored, wrote as under :

"2. Looking to these facts, it will be seen that MOCHI community was never included in the list of Scheduled Castes in Gujarat except for the incoming area from Maharashtra viz. Dangs District, and Umargaon Taluka now forming the part of Balsar District. The exact position whether the members of the MOCHI Community in the Dangs district and Umargaon Taluka of Bulsar district are still considered as untouchables by members of other communities and whether they are subjected to any disability arising out of untouchability was again ascertained by the State Government recently and it has been found that "MOCHIS" in Dangs district and Umargaon Taluka of Bulsar district hailed from Maharashtra area of Ex-Bombay State and belonged to "Chambhar" Community which has been included in the list of Scheduled Castes by the Government of Maharashtra. The Gujarat Government, therefore, feels that it would not be proper to request the Government of India to cancel the area restriction for these MOCHIs of Dangs district and Umargaon Taluka of Bulsar district from the list of Scheduled Castes.

3. The MOCHI community is treated as

Scheduled castes in the districts of Dangs and Umargaon Taluka of Bulsar District only and hence, the community residing in other areas of Gujarat viz. Saurashtra, Kutch and in other 10 districts of the old Bombay territory cannot be, as they were never treated as untouchables in the past of (nor?) are being treated as untouchables at present, treated as Scheduled Castes except in the area of Dangs district and Umargaon Taluka of Bulsar district.

4. The State Government, therefore, feels that the matter requires to be brought to the notice of the ministry of Home Affairs, Government of India particularly in view of the fact that the MOCHI community was never treated as Scheduled Castes in the areas of 18 districts out of the 19 districts of this State as they did not suffer from the disability arising out of untouchability. Therefore, the area restriction for MOCHI community which has been removed under the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976, so far as the Gujarat is concerned, if removed by some error of representation the same need to be restored in relation to the Dangs district and Umargaon Taluka of Bulsar district. The State Government, therefore, proposes that the area restriction for MOCHI community in relation to the Dangs district and Umargaon Taluka of Bulsar district should be restored in view of the position explained above. I am, therefore, directed to request you to place this proposal before the Government of India for consideration and appropriate action under intimation to this Government." (emphasis supplied).

16.2 The request to restore area restriction in relation to Mochi community in Gujarat by amending the Scheduled Castes & Scheduled Tribes Orders (Amendment) Act, 1976 was repeated in letter dated September 7, 1977 of the Chief Minister Mr.B.J.Patel to Mr.Charan Singh, Minister of Home Affairs, Government of India, letter dated 18-10-1977 addressed to the Prime Minister of India Mr. Morarjibhai Desai, letter dated August 22, 1990 of the Chief Minister Mr.Chimanbhai Patel addressed to the Minister of Labour & Welfare, Government of India, letter dated 28th March 1994 of the Chief Minister Mr.Chhabildas Mehta addressed to the Minister of Welfare, Government of India, letter dated 3-5-1999 of the Chief Minister Mr.

Keshubhai Patel to Shri Atalbihari Vajpayee, Prime Minister of India, and other letters addressed to the Government of India.

16.3 Pursuant to the representations of the State Government, it appears from the record that a Bill was prepared to restore the area restriction in respect of Mochi Community. The extract from Bill No.84 of 1978 which is on record, reads as under :

> "The Government of Gujarat have represented that removal of area restrictions in the case of Mochi community is not justified because this community has never suffered from any disability arising out of the practice of untouchability in any part of Gujarat State, except the Dangs district and Umbergaon Taluka of the present Bulsar district. It has also been pointed out that mochis elsewhere in the State being comparatively more advanced, are likely to take away the benefits which ought to go to the members of this community residing in Dangs district and Umbergaon Taluka. The present Bill, therefore, seeks to restore the position in respect of the Mochi community in the list of Scheduled Castes of Gujarat State which obtained prior to the enforcement of the Scheduled Castes and scheduled Tribes Orders (Amendment) Act, 1976."

16.4 The said bill, however, lapsed and the matter remained pending. Ultimately, by the impugned Amendment Act of 2002, the Constitution (Scheduled Castes) Order, 1950 was amended and in part IV of its Schedule, Entry 4 was substituted by referring to Mochi caste of Dangs district and Umargaon Taluka only. Thus, only Mochi caste of the specified area was included as Scheduled Caste in the list of the Order of 1950 and the earlier position was restored. The Mochi community of Gujarat has through the petitioner public trust challenged the Amendment Act of 2002 to the extent it makes the above change in the entry of the Order of 1950.

17. Part XVI of the Constitution contains special provisions relating to certain classes, the foremost being reservation of seats for the scheduled castes and scheduled tribes in the House of People under Article 330 and similar provision for the State Legislative Assemblies under Article 332. Article 330, inter alia, provided for reservation of seats for the scheduled castes in the same proportion to the total number of seats allotted to the State or Union Territory in the

House of the people as the population of the scheduled castes in the State or Union territory or part thereof, as the case may be, in respect of which, seats are so reserved, bears to the total population of the State or Union Territory. Article 79 of the Constitution provided for Constitution of Parliament. Therefore, since the Parliament was to be constituted as per the provisions of the Constitution, it became imperative to provide for the method of working out the number of seats to be reserved for the scheduled castes and scheduled tribes and this exercise was done in Article 330 itself. The protective discrimination was made obviously in the context of Article 46 of the Constitution by which a directive was issued to the effect that the State (as defined under Article 12) shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the scheduled castes and the scheduled tribes and shall protect them from social injustice and all forms of exploitation.

17.1 It was simultaneously, by Article 335 of the Constitution, provided that the claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of the appointments to service and posts in connection with the affairs of the Union and of a State. In the context of Article 335, it was, inter alia, provided in Article 320(4) that, nothing in Article 320(3) shall require a Public Service Commission to be consulted "as respects the manner in which effect may be given to the provisions of Article 335".

17.2 The provisions for reservation of seats for scheduled castes / scheduled tribes are already contained in the Constitution itself, as noticed above, under Article 330 / 332 and such reservation was meant to be made for a limited period of ten years when the Constitution was adopted. The castes notified as scheduled castes for this purpose were, therefore, intended to be given the benefit of reservation of seats under the special provisions of Articles 330 and 332 for ten years, and therefore, the list notified under Article 341(1) had a limited purpose to achieve in the context of its duration in respect of special provisions relating to reservation of seats. No such time limit was prescribed for the claims of scheduled castes to services / posts, because, the Constitution itself did not make special provision of reservation to such posts, and since making of any provision for reservation of appointments or posts in favour of any backward class of citizens was left to

be made by the State under Article 16(4) as amplified later on by inserting clause (4A) (by section 2 of the Constitution 77th Amendment Act, 1995) in Article 16 by specifically referring to Scheduled Castes and Scheduled Tribes who were not adequately represented in the services. Thus, while reservation of seats was a mandate under the Constitution for a period specified under Article 334; the matter of making reservation in services / posts was left to the State by enabling it under Article 16(4) to do so. Similarly, an enabling provision was introduced in Article 15(4) of making special provisions for advancement of any socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes. It will be noticed that when the Constitution (Scheduled Castes) Order, 1950 was issued, the expression "Scheduled Castes & Scheduled Tribes" was not there in Articles 15 or 16. However, Article 335 did provide for the claims of the members of the scheduled castes / scheduled tribes to be taken into consideration, in making of appointments to services / posts in connection with the affairs of the Union / State consistently with the maintenance of efficiency of administration keeping in view the directive principle of State policy enshrined in Article 46 of the Constitution that : The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.". The enabling provision of Articles 16(4A) was supplemental to Article 335 so that protective discrimination contemplated thereunder when spelt out by the State is not assailed on the ground of discrimination on the basis of caste.

17.3 The provisions of Constitution relating to reservation of seats were to cease to have effect on the expiry of a period of ten years from the commencement of the Constitution which period was extended from time to time currently being "sixty years from the commencement of the Constitution", as provided by Article 334 of the Constitution.

18. It is, in the context of the above provisions that Article 341, re-produced hereunder, is to be viewed:

"341. Scheduled Castes -

(1) The President may with respect to any State or Union territory, and where it is a State

after consultation with the Governor thereof by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that state or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid notification issued under the said clause shall not be varied by any subsequent notification."

18.1 While Article 341 enables the President to specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of the Constitution be deemed to be Scheduled Castes in relation to that State, or Union territory by public notification, such notification issued under Clause (1) shall not be varied by any subsequent notification as provided by clause (2) of Article 341. Therefore, once a public notification is issued with respect to any State or Union territory that notification cannot be varied by the President. The Constitution specifies the territories of the States and the Union territories in the First Schedule. As and when new States were formed, for which obviously there existed no notification, the President had power to issue notification under Article 341(1) because for that new State, such notification would not be a variation of the existing notification, but a fresh notification which could, after its issuance, not be varied by the President. Under Clause (2) of Article 341, the Parliament is enabled to include in or exclude from the List of Scheduled Castes specified in the notification issued under Clause (1) by the President by making such law.

18.2 Why was the President given this limited power to issue notification with respect to the States or Union Territories, and then the matter of variation of the List of Scheduled Caste so published was left to the Parliament? The reason appears to be this : When the Constitution was adopted, the Parliament was yet to be formed pursuant to its constitution under Article 79. That could be done only by holding elections on the pattern adopted under the Constitution which contemplated

reservation of seats for the scheduled castes and scheduled tribes under Article 330. For the purpose of fulfillment of the constitutional promise of reservation of seats for the scheduled castes and scheduled tribes contained under Article 330, identification of scheduled castes and scheduled tribes was imperative and without which, elections to the Houses of People could not have been held in accordance with the provisions of Article 81 for the purpose of which the President was required to specify scheduled castes under Article 341(1) and scheduled tribes under Article 342(1). Since the Houses of Parliament constituted by Article 79 were yet to be composed and elections were required to be held for composition of the House of People, the President came to be empowered by Article 341(1) to specify the list of scheduled castes for the purposes of the Constitution. In fact, this was the immediate purpose at the time when the Constitution (Scheduled Castes) Order, 1950 was issued by the President, because, the provisions regarding reservation of seats in the House of People for the Scheduled Castes already existed under Article 330(1)(a) while other purposes underlying Article 16(4), 46 and 335 were in their embryonic form and were yet to be spelt out pursuant to these provisions. On formation of the House of People, any change of scheduled castes specified in the Presidential notification became the concern of the Parliament in the context of reservation of seats for the Scheduled Castes under Article 330 affecting its composition, and that is why the task of variation of the list of scheduled castes was left to the exclusive legislative domain of the Parliament. As regards the States which were created subsequently, as and when they were created, there being no notification with respect to such new States, the President continued to be empowered by virtue of Article 341(1) to issue similar notifications with respect to the new State and which could be varied thereafter only by the Parliament.

18.3 The modalities for issuance of public notification under Article 341(1) are prescribed therein for the President. When the power is to be exercised in relation to a State, consultation with the Governor thereof was required to be done. The President has power to specify not only the entire caste but even part or groups within the caste in the notification. The power to specify castes is to be exercised in relation to States or Union territories. It can also be exercised for any part within the territorial limits of a State. The exercise of specifying the Scheduled castes is to be done for the purpose of the Constitution. The provision clearly empowers the President to specify "parts of or

groups within the castes" as scheduled castes. The Parliament under Article 341(2) can vary the notification under clause (1) by including in or excluding from the list of scheduled castes specified therein any caste or "part of or group within any caste". Therefore, the Parliament could, by removing or imposing area restriction, make inclusion or exclusion of any caste or group or part within such castes in the Presidential Notification. The power of the Parliament to make law under Article 341(2) is confined to inclusion in or exclusion from the list of Scheduled Castes specified in the public notification issued by the President. In making such law, the Parliament has to follow the same legislative procedure as it is required to follow in respect of other laws. The permissible variation in the list of the Scheduled castes will also obviously be in the context of the purposes of the Constitution for which the caste or group within it may be specified as Scheduled Castes.

19. What then will be the nature and ambit of the powers conferred on the President and the Parliament under Article 341 and is the exercise of such power amenable to judicial review are the pivotal questions around which the debate raised by the learned counsel with great erudition has revolved.

20. The powers of the President arise from and are defined by the Constitution. The President is the repository of all the executive power of the Union which is to be exercised by him in accordance with the Constitution. The power of Parliament, however, to confer by law functions on authorities other than the President is kept intact under Article 53(3)(b), thereby placing the President as the Constitutional Head in our Parliamentary democracy system of governance. The executive power is the residue of the functions of the State which are neither legislative nor judicial. The executive power of the Union extends under Article 73(1)(a) to the matters with respect to which the Parliament has power to make laws. The President of India was not intended to be made a mere figure-head though he was required to act by the aid and advice of the Council of Ministers as provided under substituted provision of Article 74(1) which always was to be so understood. Circumstances may exist where the immediate promulgation of the law is absolutely necessary and there is no time in which to summon the Parliament. The President has been, therefore, empowered to promulgate Ordinances during the recession of the Parliament. "A Democratically Elected President who has moreover to act

on the advise of the Ministers responsible to the Parliament is not at all likely to abuse any Ordinance making power with which he may be invested". (See note below clause 17 of the Recommendation of the Union Constitution Committee - Indian Constitutional Documents Munshi Papers, Volume II at page 254).

20.1 The sub-committee of the Union Constitution Committee came to the conclusion that :

> "The President should not be reduced to the position of a figure-head like the French President, but should have a status and authority equal to that of the legislature, by being chosen as the nation's representative by the whole country, though indirectly, through an electoral college consisting of all the elected embers of the legislatures in the country.
>
> The conclusion, when approved by the Union Constitution Committee with a few verbal alterations, became the basis for the relevant Articles as finally adopted by the Constituent Assembly." (See Indian Constitutional Documents - Vol.I - "Pilgrimage to Freedom" - by Dr. K.M.Munshi at p. 258).

20.2 Since the Constitution does not contain any provision requiring the President to act in his discretion, it is logical to conclude that he must, in all matters (apart from the discretionary powers, such as, returning of Bill for reconsideration under Article 111 conferred on the President), act on the advice of his Council of Ministers in exercise of his functions. Such conclusion is also supported by the fact that Article 75(3) which makes the Union Council of Ministers collectively responsible to the Lok Sabha is unambiguous and must, therefore, be taken to predicate a constitutional status for the President. Under Article 74, the expression "who shall, "in the exercise of his functions" act in accordance with such advice, the President is bound by the advice of the Council of Ministers and all his functions are to be exercised in accordance with such advice. The word "functions" under Article 74(1) has to be given a wider meaning having regard to the responsible nature of the government in a parliamentary democratic system and would embrace not only the executive functions, but also the law making functions, such as, framing of rules, regulations and notifications. This would a fortiori mean that the Court

will not go into material or its sufficiency with that part of procedural advice in respect of the exercise of the presidential functions under Article 74 of the Constitution.

20.3 The words "aid and advice" have to be understood not by the words used in dictionary, but by considering their origin and the line of their growth. The expression "aid and advice" is a constitutional euphemism and embodies the well-known British convention, where the King always acts on the advice of his ministers, even though all power is legally vested in him, and it is in that sense, the words "aid and advice" have to be understood in respect of exercising powers by the President of India.

21. As a component part of the Parliament, the President, in theory, possesses extensive legislative powers. The modern concept of State demands that the State Executive Head should also have some legislative powers. Executive bodies, especially in recent times, perform acts which are difficult to distinguish from legislation, on the one hand and judicial functions on the other. (See "A Grammar of Politics" by Harold J. Laski (4th Edition) at page 296). The Constitution being the highest law, the "grund-norm" cannot be expected to provide for all the rules of governance. It is therefore a source of all powers to the three wings of the State. The President has been entrusted with variety of law making powers such as, of making of Ordinances, Rules, Orders, Notifications, Regulations, under the following constitutional provisions. The Presidential powers of law making under the Constitution has the assurance of independent handling of the issues covered by such powers and raises its exercise to the level of national perspective away from the grips of the parochial aspects of the bureaucrat government.

21.1 Under Article 77(3), the President is required to make rules for the more convenient transactions of the business of the Government of India and for allocation of the said business among the Ministers. Under Article 108(1)(c), the President may issue a public notification to summon the Houses, if they are not sitting. The President may make rules as to the procedure with respect to the joint sittings of and communications between the two Houses. The President has legislative power of limited duration under Article 123 to promulgate Ordinances which "shall have same force and effect as an Act of Parliament". Under proviso to Article 146 (1), the President may by rule require that, in such cases as

may be specified in the rule, consultation with UPSC with respect to the appointment of a person to any office connected with the Supreme Court shall be necessary, if such person is not already attached to the Court. Under Article 148(5), the President may, after consultation with the Comptroller and Auditor General, prescribe rules regarding the conditions of service of persons serving in the India Audit & Accounts Department and prescribe administrative powers of the Comptroller and Auditor General. The President has power to issue Order, under Article 170(3) second proviso, to specify the date when the re-adjustment of seats in the Legislative Assemblies and territorial constituency of each State shall take effect. Under Article 190(2), the President may specify in rules period at the expiry of which the persons seat in the Legislatures of all States shall become vacant unless he has previously resigned his seat from all but one of the States. Under Article 222(2), the President may issue Order fixing compensation allowance receivable by a transferee judge. The President may by Order determine allowance of retired judges appointed under Article 224A at sittings of High Courts. Under Article 239AB, the President may by order suspend the operation of Article 239AA or of any provisions of law made in pursuance of Article 239AA (Special provisions with respect to Delhi). Under Article 240, the President has power to make regulations for the peace, progress and good governance of certain Union territories. Under proviso to Article 243(L), the President may by public notification direct that the provision of Part IX shall apply to any Union territory or part thereof, subject to such exceptions and modifications as he may specify in the notification. Under Article 263, the President may establish by Order, an Inter State Council under Article 263 and define the nature of its duties and its organization and procedure. Under Article 275(2), the President may by order exercise powers conferred upon the Parliament under clause (1), subject to any provision that is made by the Parliament. Under Article 283(1), until provision is made by parliament, regulating by law custody etc. of consolidated funds, contingency fund and moneys credited to the public accounts, the President shall regulate the same by rules. Under Article 288(1), the President may by order provide for removal of exemption from taxation by states in respect of water or electricity in certain cases. The President or such person as he may direct may frame rules regulating the recruitment and conditions of service in case of services or posts in connections with the affairs of the Union under proviso to Article 309. Article 318 confers powers on the President to make regulations as to conditions of

service of members and staff of the Union Public Service Commission. Under proviso to clause (3) of Article 320, the President may make regulations subject to Article 320(5) specifying the matters in which either particularly or in any particular circumstances, it shall not be necessary for Public Service Commission to be consulted as respects the All India Services and also as respects other services and posts in connection with the affairs of the Union. The President may subject to the provisions of any law made by Parliament, by rule, specify under Article 338(5)(f) functions of the National Commission for Scheduled Castes and Scheduled Tribes in relation to the protection, welfare, development and advancement of the scheduled castes and scheduled tribes. The President can by rule determine under Article 338(8)(f) any matter not specified in sub-clause (a) to (e) in respect of which the Commission shall have powers of a Civil Court. Under Clause (10) of Article 338, the President may by order specify other backward classes on report of a Commission appointed under article 340(1). Under Article 339(1), the President may by order appoint a commission to report on administration of schedule areas etc. Under Article 340(1), the President may by order appoint a commission to investigate the conditions of backward classes. The President may by public notifications under Article 341(1) and 342(1) specify the castes, races, tribes or parts or groups within them as schedule castes or scheduled tribes in respect of any State or Union territory. The President may by order authorize use of Hindi language for official purposes of the Union under Article 343(2). Under Article 344(1), the President shall by order constitute a commission on official language and define in it the procedure to be followed by the Commission. Under Article 350A, the President may issue direction as he considers necessary or proper to any State for securing provision of facilities for instruction in mother tongue at primary stage. Under Article 352(1), the President may declare by a proclamation emergency. Under Article 356, the President may, by proclamation, assume functions of the government of the State and declare that the power of the legislature of the State shall be exercisable by or under the authority of parliament and make consequential provisions. Under Article 357(1)(a), the Parliament is competent to confer on the President the powers of the legislature of the State to make laws. Under Article 359, the President may by order suspend the enforcement of right conferred by Part III during emergencies. Under Article 360, the president may by proclamation, make a declaration of financial emergency. The President may by order made under proviso to Article 367(3) declare any

state other than India not to be a foreign State for such purposes, as may be specified in the Order. Under Article 370(1)(b)(ii), the President may by order specify "other matters" in the Union and concurrent lists, with the concurrence of the Government of the State of Jammu & Kashmir with respect to which the Parliament may make laws for the said State. Under Article 370(3), the President may by public notification declare that Article 370 shall cease to be operative or shall be operative with exceptions and modifications as he may specify. Under Article 371(f)(n), the President may by public notification extend any enactment which is in force in the State in India to the State of Sikkim. The adaptation or modification of any law which the President may order under Article 372(1) and 372A(1) shall not be questioned in any Court of law.

22. The President of India has, thus, wide law making powers entrusted to him under the above provisions of the Constitution. These powers are with respect to issuance of Ordinances, Proclamations, Orders, Rules, Regulations, Notifications and Directions, all having in the territory of India the force of law. The public notifications issued by the President are gazetted notifications (See - definition of `public notification' in Article 366(19)). A public notification specifying the castes, races or tribes or parts of or groups within the castes, races or tribes which are deemed to be scheduled castes for the purposes of the Constitution issued by the President under Article 341(1) is, therefore, "law" within the meaning of Article 13(2) of the Constitution, and therefore, if any such notification takes away or abridges the rights conferred by Part III of the Constitution, it shall be void to the extent of inconsistency because, the President by virtue of Article 13(2) "shall not make any law which takes away or abridges the rights conferred" by Part III.

23. The pendulum of arguments of the rival parties swung from one extreme of non-availability of judicial review of the public notification issued under Article 341(1) or of the Amendment Act made under Article 341(2) by the Parliament varying it, to the other extreme of such action being open to close judicial scrutiny in view of the special nature of power coupled with duty entrusted to these functionaries thereunder for the purpose of achieving the purpose of ameliorating the lot of the scheduled castes. It was contended by the learned counsel representing the learned Attorney General during the course of his arguments that the list specifying the scheduled castes was to be treated as a part of the

constitutional provisions, because, section 366(24) instead of enumerating the scheduled castes by attaching the schedule in the Constitution itself has left it to the President to specify them and such list should be read in Article 366(24) and therefore, any judicial review thereof would amount to reviewing a constitutional provision. We feel that this contention has been pitched rather too high. The Constitution has entrusted Parliament the function of making laws with respect to the matters enumerated in the Union and Concurrent Lists and on all residuary matters not mentioned in the State List apart from the emergency power or power derived from the volition of the State Legislatures to enact laws even with respect to the matters falling in the State List. Such laws enacted on the basis of the legislative power conferred by the Constitution do not become part of the Constitution with reference to their relevant subjects of the legislative lists. Therefore, the list of scheduled castes made by the President by issuing public notification with or without variation by a Parliamentary Amendment Act under Article 341(2) cannot be treated as the provision of the Constitution itself under Article 366(24) defining scheduled castes. The public notification, with or without variation by Amendment Act of the Parliament will, therefore, be subject to judicial review in the same way as any other law made by the appropriate legislature in exercise of its legislative functions is subject to by virtue of the constitutional powers of the higher judiciary.

23.1 The object of Article 341(1) and 342(1) was to eliminate the necessity of burdening the Constitution with long lists of Scheduled Castes and Scheduled Tribes. The President is, therefore, empowered to issue a general notification in the gazette specifying all the castes and tribes or groups thereof deemed to be the Scheduled Castes and Scheduled Tribes for the purposes of the privileges which were defined for them in the Constitution. The only limitation that has been imposed on this power is that once the notification has been issued by the President, in consultation with and on the advice of the Government of each State, thereafter, if any elimination was to be made from the List so notified or any addition was to be made, that must be made by the Parliament and not by the President. "The object of this restriction was to eliminate any kind of political factors having a play in the matter of the disturbance in the Schedule so published by the President". (See B.R.Ambedkar - 300A and 300B (corresponding to Articles 341 and 342) in the Draft Constitution : The Constituent Assembly Debates, Volume 9, Page 1637).

23.2 There is no rigid separation of powers possible in the Montesquieuian way for a harmonious and responsible governance of the country. The bulk of legislative power is vested in the appropriate legislatures under Article 246 read with the legislative Lists of Scheduled 7 to the Constitution. However, under several other provisions of the Constitution (as for example, under Articles 2, 3, 11, 16(3), 22(7), 32(3), 33, 34, 35, 49, 59(3), 65(3), 71(3), 75(6), 80(5), 81(1)(b), 82, 83, 84(c), 97, 98(2), 100(3), 101(1), 102(1)(e), 105(3), 106, 122(3)(g), 119, 120(2), 124, 125, 138, 139, 140, 148(3), 149, 158(3), 169(1), 170(3), 171(3), 172(1), 173(c), 221(1), 222(2), 230(1), 231(1), 239AB, 239AA(2)(b)(7), 241, 243M(4)(b), 243ZC(3), 244A(1), 247, 248, 249(1), 250, 252, 253, 262, 267, 269(3), 275, 280(2), 283(1), 285, 286, 289(3), 292, 293(2), 297(3), 298, 302, 303(2), 307, 312, 312A, 315, 323A(1), 327, 341(2), 342(2) and 343(3), the Parliament is entrusted with power to make laws apart from its bulk legislative power enumerated in the Union and the Concurrent List and its general residuary power. It will be too late in the day to dim the exercise of judicial review adopted as a constitutional safeguard against making of laws violating the Constitution. One may recall here Harold Laski stating : "What Prof. Dicey has called the rule of law is, with all its implications fundamental. It means that the State must be put on an equality with all other bodies, that it must answer for its acts; it means also, that no mysterious prerogative should intervene to prevent attainment of justice. The power of the judiciary over the executive is, therefore, if contingent, nevertheless is essential". (See "A Grammar of Politics" by Harrold J. Laski, Chapter 8 "Political Institutions", at page 298 of the 4th Edition). The Presidential notification under Article 341(2) whether varied or not by parliamentary legislation is not a "mysterious prerogative". The President acting on the aid and advice of the Council of Ministers issues such public notification and since it has a force of law, it is an instance of "executive legislation" or "executive law making". The power under Article 341(1) read with Article 366(24) is not a constituent power and the list notified under Article 341 (1) of the Scheduled Castes, is not a provision of the Constitution and therefore, variation in such list is not a constitutional amendment and need not be viewed with the constraints attached to the extent of judicial review of a constitutional amendment.

24. Ability of the higher judiciary to review the

constitutional validity of the actions of the executive and legislative branches of the State is the hallmark of the Indian system of governance under the Constitution. The role of the higher judiciary as constitutional guardian cannot easily be circumscribed. When a statute violated the Constitution it was the duty of the Courts to apply the Constitution as paramount law which superceded inconsistent statutes.

24.1 Presidential laws have often been the subject matter of judicial review. The Apex Court in context of proclamation under Article 356 held in S.R.Bommai v. Union of India (1994)3 SCC 1 that a proclamation issued by the President under Article 356 is amenable to judicial review. It was, however, held that it would be wholly incorrect to view the exercise of the President's satisfaction on par with the satisfaction recorded by executive officers in the exercise of administrative control. Distinguishing judicial review from the justiciability by the Court, it was held that the two concepts are not synonymous, and that, justiciability of the decision taken by the President is one of the exercise of powers by the Court hedged by self-imposed judicial restraint. Judicial review is a basic feature of the Constitution and the Supreme Court and the High Courts have constitutional duty and responsibility to exercise judicial review as sentinel on the qui vive. Judicial review is however not concerned with merits of the decision but with the manner in which the decision was taken.

24.2 In the context of judicial review of President's Order granting relief under Article 72, the Supreme Court held in Kehar Singh v. Union of India, (1989)1 SCC 204, that the Court can go into the nature and extent of the power under Article 72 but exercise of the powers on merits is not open to judicial review. In R.K.Jain (1993) 4 SCC 119, it was held that it is the constitutional, legitimate and lawful power and duty of the Supreme Court to ensure that powers, constitutional, statutory or executive are exercised in accordance with the Constitution and the law. In the context of Ordinance issuing power under Article 123, the Supreme court in A.K.Roy v. Union of India, reported in (1982)1 SCC 271, held that judicial review of the President's satisfaction regarding the necessity to issue an Ordinance is not totally excluded. The question as to whether the pre-conditions to exercise of powers under Article 123 have been satisfied or not, cannot be regarded as a purely political question and kept beyond judicial review. In Kaiser-I-Hind Pvt. Ltd. v.

National Textile Corpn. (Maharashtra North) Ltd., reported in (2002)8 SCC 182, the Supreme court held that, granting assent under Article 254(2) was not exercise of legislative power of the President such as contemplated under Article 123 but is a part of the legislative procedure, and that, whether procedure prescribed by the Constitution before enacting the law is followed or not can always be looked into by the Court. (See paragraph 29).

24.3 The laws made by the Parliament with respect to any of the subjects enumerated in the Union and Concurrent List or made under any of the specific provisions of the Constitution, such as, under Article 341(2), cannot be subjected to different yardsticks of judicial review. The presumption of constitutionality of a statute attaches to all types of laws made by the appropriate legislature within its legislative competence under the Constitution. However, judicial review is provided for in the Constitution itself and the higher Courts in the country are constitutionally obliged to exercise the power of judicial review in every matter which is constitutional in nature or has potential of constitutional repercussions and the test for interference is constitutional violation. Though wisdom of legislative policy may not be open to judicial review, but when the wisdom takes the concrete form of law, the same must stand the test of being in tune with the fundamental rights and if it trenches upon any of the fundamental rights, it is void as ordained by Article 13 and cannot be shielded on the ground that it enacts a legislative policy. [See A.L.Kalra v. Project & Equipment Corporation of India Ltd., reported in (1984)3 SCC 316]. The State, however, has the full freedom to experiment in implementing its policy for achieving a desired object. Though the Courts have no function in the evaluation of the policies or in determining whether they are good or bad for the community, they however have, in examining the legislative action taken by the State in furthering the ends, to ensure that the means adopted do not conflict with the provisions of the Constitution within which the State action has to be confined.

24.4 It is, therefore, clear from the nature of law making power of the executive head - the President conferred on him by Article 341(1), as also from the legislative power of the Parliament specified in Article 341(2) of making variation in the notification issued by the President under Article 341(1) that both the public notification issued by the President as well as the

Amendment Act of the Parliament varying such notification are ordinary law made in exercise of the law making or legislative power and cannot be elevated to the level of Constitutional law which is made in exercise of constituent power. Since both the public notification issued by the President under Article 341(1) as varied and the impugned Amendment Act of 2002 are ordinary law within the meaning of Article 13(2), their validity is to be decided on the touchstone of the Constitution.

24.5. We, therefore, reject the contention that the public notification under Article 341(1) or the Amendment Act, 2002, varying that notification, determining the scheduled castes, being part of the constitutional provision of Article 366(24) cannot be questioned on the basis of violation of Article 13(2).

25. The Houses of Parliament make rules for conduct of their business under Article 118(1). The legislative procedure as to introduction and passing of a Bill seeking amendment in the public notification issued under Article 341(1) would be the same as is prescribed for the other laws made by the Parliament. When a Bill has been passed by the Houses of Parliament, it is presented for assent of the President under Article 111. By Article 122(1), it is provided that the validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure. The consideration of a Bill proposed for amendment in the public notification issued under Article 341(1) is a matter which is regulated by the internal rules of business of the Houses of Parliament. No inquiry is permissible by any outside agency to examine what procedure was adopted for the purpose of considering such Bill by the Houses of Parliament and in what manner was the Bill considered and which material and factors weighed with the Houses of Parliament in reaching their collective wisdom for the passage of the Bill. While the matters which went into consideration or their sufficiency or adequacy are insulated from being called in question by Article 122(1), the impact of the statutory provisions which are enacted would obviously be subject to judicial review in the context of the legislative competence or violation of any fundamental right. The consideration of the material or its sufficiency by the Parliament are the matters entirely within its domain and whom to consult, how to consult, whether to consult, what material to call for, what other factors in the context of the governance of the country to consider, the desirability of the provisions and the social and economic repercussions are all matters within

the exclusive domain of the Parliament and there is no way by which an outside agency can interfere with the procedure of consideration of such a Bill by the Parliament. The representatives of the people are by the very nature of our democratic set-up presumed to know the pulse of the people and to be aware of what is for their good and what balancing of interest is required to be done. There is no permissible way of knowing what material was actually considered by the Houses of Parliament, what aspects were discussed and on what basis the Amendment Act was made under Article 341(2). Therefore, one cannot do what is impermissible by considering material available at the stage prior to Parliamentary consideration of the Bill and on the basis of the views of the State Government or the Registrar General of India or the National Commission for Scheduled Castes & Scheduled Tribes come to a finding about non-consideration or insufficiency of material before the Parliament, without having any means to know whether this and what other material weighed in favour of the passage of the Bill by the Houses of Parliament. Due to the Constitutional insulation of the Parliamentary procedure in passage of Bills prescribed under Article 122(1), the examination of the adequacy of material or the processes adopted by the Houses of Parliament in consideration of the Bill and enacting the impugned Amendment Act of 2002 lacks adjudicatory disposition and no scrutiny beyond the scope of permissible judicial review can be undertaken even in respect of the Amendment Act made under Article 341(2) on the `power coupled with duty' - doctrine, as was sought to be contended by the learned counsel for the petitioner. The Amendment Act made by Article 341(2) exhausts itself by making variation in the list of the Scheduled Castes notified under Article 341(1) and disturbing the Amendment Act, which is just a shell having achieved its purpose of varying the list of Scheduled Castes by inclusion or exclusion, by scrutiny by the Court will have a direct impact on the list published under Article 341(1) itself as so varied. The judgments of the Apex Courts rendered in the context of public notification under Article 341(1) will, therefore, apply with equal force for regulating the scope of judicial review even to the list of Scheduled Castes as varied by the Parliamentary Amendment. The contention of the learned Senior Counsel for the petitioner that the decisions of the Apex Court that inclusion in or exclusion from the list of scheduled castes cannot be ordered, are not applicable to the nature of challenge raised against the constitutionality of the impugned Amendment Act cannot, therefore, be accepted.

26. That takes us to the examination of the contention that the list of scheduled castes as amended by the impugned Amendment Act 2002 is in its impact arbitrary and discriminatory. The record referred to hereinabove clearly reveals that all Mochis of Gujarat were not treated as "untouchables" which was an important and acceptable basis on which the castes or groups within the castes could be specified as scheduled castes.

26.1 Shri V.I.Muniswami Pillai, while the provision was being introduced from the draft Constitution, made the following observations, which indicate that the Scheduled Castes were castes who suffered the disability due to the social evil of untouchability which was practiced by the Hindu community for ages against them :

> "But, I would like to inform this House of the background which brought out the special name of Scheduled Castes. It was the untouchability, the social evil that has been practised by the Hindu community for ages, that was responsible for the Government and the people to know the section of people coming under the category of Hindus and who were kept at the outskirts of the Hindu society. Going backwards to 1961, it was in that year when Government found that something had to be done for the untouchable classes, (when they said untouchable classes, they were always understood to be Hindus,) and they had to be recognized. In Madras, there were six communities that came under this classification. During the Montago Chelmsford reforms they were made ten. In 1930 when the great epoch-making fast of Mahatma Gandhi came about, then only the country saw who were the real untouchable classes. And in the 1935 Act, the Government thoroughly examined the whole thing and as far as the Province of Madras is concerned, they brought 86 communities into this list or category, though there were some touchable classes also. Now, after further examination, the Provincial Governments have drawn up a list and I think according to the amendment mover's suggestions, all these communities that come under the category of untouchables and those who profess Hinduism will be the Scheduled Castes."

26.2 From series of documents which have been referred to hereinabove, such as, Report of 1930, Report of the Joint Committee etc., it is clear that untouchability was

the criterion adopted for inclusion in the list of the Scheduled Caste.

26.3 Extreme social & economic backwardness arising out of traditional practices of untouchability is normally considered as criterion for including a community in the list of Scheduled Castes (See decision of the Supreme Court in Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College, reported in (1990)3 SCC 130). Though "untouchability" is a symptom of backwardness, all backward classes are not untouchables. Among the backward classes, untouchables are the worst lot socially and if the law provides that a group or a part within the Mochi caste be specified as scheduled caste, while others are classified as O.B.C. on the basis of the historical factual data based on the local practices, it cannot be said that equals are treated unequally. The concept of equality is contextual. The context of Mochis of Dangs district and Umargaon Taluka of Valsad district by virtue of their being treated as untouchables was sufficient to classify them as scheduled castes while other members of the Mochi community in other parts of Gujarat who though backward but were not treated untouchables in the other parts of the State and were classified as O.B.C. (for whom also benefits similar to those admissible to the scheduled castes could be provided) cannot claim to be falling in the same class of those who were treated as untouchables. Such classification is reasonable and has sufficient nexus with the object sought to be achieved by the law dealing with the claims of the Scheduled Castes persons. The challenge against the constitutionality of the impugned Amendment Act, 2002 and the impugned entry No.4 of the Schedule to the Presidential Order 1950, raised by the petitioner, therefore, fails.

27. There cannot be an embargo on the legislative process of amending the list of scheduled castes under Article 341(2) and even if area restriction was earlier removed by the Amendment Act of 1976, re-imposition of area restriction by the subsequent Amendment Act of 2002 was within the legislative competence of the Parliament. Exercise of such legislative power by making the Amendment Act of 2002 under Article 341(2) cannot be questioned on the ground that the earlier Act of 1976 viewed the matter differently. The decision of the Division Bench of this Court which was rendered in the context of the Act of 1976 cannot therefore assist the petitioner. The validity of the Amendment Act of 2002 cannot be judged on the basis of the ratio of the decision rendered in the context of the earlier Amendment

Act of 1976 in view of the clear legislative competence of the Parliament not only to make law but to change the law by subsequent legislation. The exercise of legislative power on a subject is not a static matter and one time exercise on that subject and there is no justification for such stultifying view of the power of the legislature. The Parliament has plenary power to make and unmake the laws in accordance with the Constitution. Therefore, the power of the Parliament to frame the impugned Amendment Act of 2002 cannot be assailed on the ground of the earlier decision of this Court rendered in context of the earlier law.

Conclusions :

28. We, therefore, conclude :

(i) The List of Scheduled Castes specified in the public notification issued by the President under Article 341(1) of the Constitution whether varied or not by the Parliament under Article 341(2) can not be treated as the provision of the Constitution itself under the definition clause 366(24) and the Amendment Act made under Article 341(2) varying the Constitution (Scheduled Castes) Order, 1950 cannot be treated as an amendment of any constitutional provision.

(ii) The public notification issued by the President under Article 341(1) and the Amendment Act made by the Parliament under Article 341(2) are ordinary law within the meaning of Article 13(2) of the Constitution. The Amendment Act made under Article 341(2) is not made by the Parliament in exercise of constituent power, but is enacted while exercising its legislative power spelt out in Article 341(2).

(iii) Both the public notification issued by the President under Article 341(1) as well as the Amendment Act made by the Parliament under Article 341(2) being "law" within the meaning of Article 13(2) are amenable to judicial review on the ground of violation of fundamental rights conferred by Part III of the Constitution.

(iv) Though the process of making of the Presidential Notification under Article 341(1) and the legislative process of making of the Amendment Act under Article 341(2) cannot be subjected to judicial scrutiny and lacks adjudicatory

disposition in view of the constitutional insulations contained in Articles 74(2) and 122, the impact of such "law" can be tested on the ground of constitutional violation.

(v) The Parliament has legislative power to exclude a caste or part of or group within the caste from the list of the Scheduled Castes under Article 341(2) even if by earlier law, it had included that caste or group or part thereof in such list.

(vi) The classification of the Mochi caste of Dangs district and Umargaon Taluka of Valsad district and the Mochi caste of the other areas of Gujarat on the ground of the former being treated as "untouchables" and the latter not, is a valid classification having reasonable nexus with the object sought to be achieved by the impugned legislation.

(vii) The impugned provisions of the Constitution (Scheduled Castes) Orders (Second Amendment) Act, 2002 and the Constitution (Scheduled Castes) Order, 1950, as varied by it, imposing area restriction for recognition of Mochi community are neither discriminatory nor arbitrary and do not violate any fundamental right of the petitioner and are constitutionally valid provisions.

Final Order :

29. For the foregoing reasons, the challenge of the petitioner against the impugned Amendment Act of 2002 and the imposition of area restriction in respect of the Mochi caste as done in the varied entry 4 of the Order of 1950, as well as against the impugned Government Resolution dated 18-2-2003 fails and the contentions raised on behalf of the petitioner and the supporting respondent No.10 have no substance. The petition is, therefore, rejected. Rule is discharged. There shall be no order as to costs.

30. At this stage, the learned counsel for the petitioner requests for certificate of fitness under Articles 132(1) and 133(1)(a) that the case involves substantial question of law as to the interpretation of the Constitution which was also of general importance. In our opinion, the extent of judicial review permissible under Article 341 of the Constitution has been the subject matter of various apex Court's judgements and

there is hardly any substantial question of law as to the interpretation of the Constitution or of general importance involved in the matter meriting issuance of such certificate. The request is, therefore, rejected.

[R.K.ABICHANDANI, J.]

[D.H.WAGHELA, J.]

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